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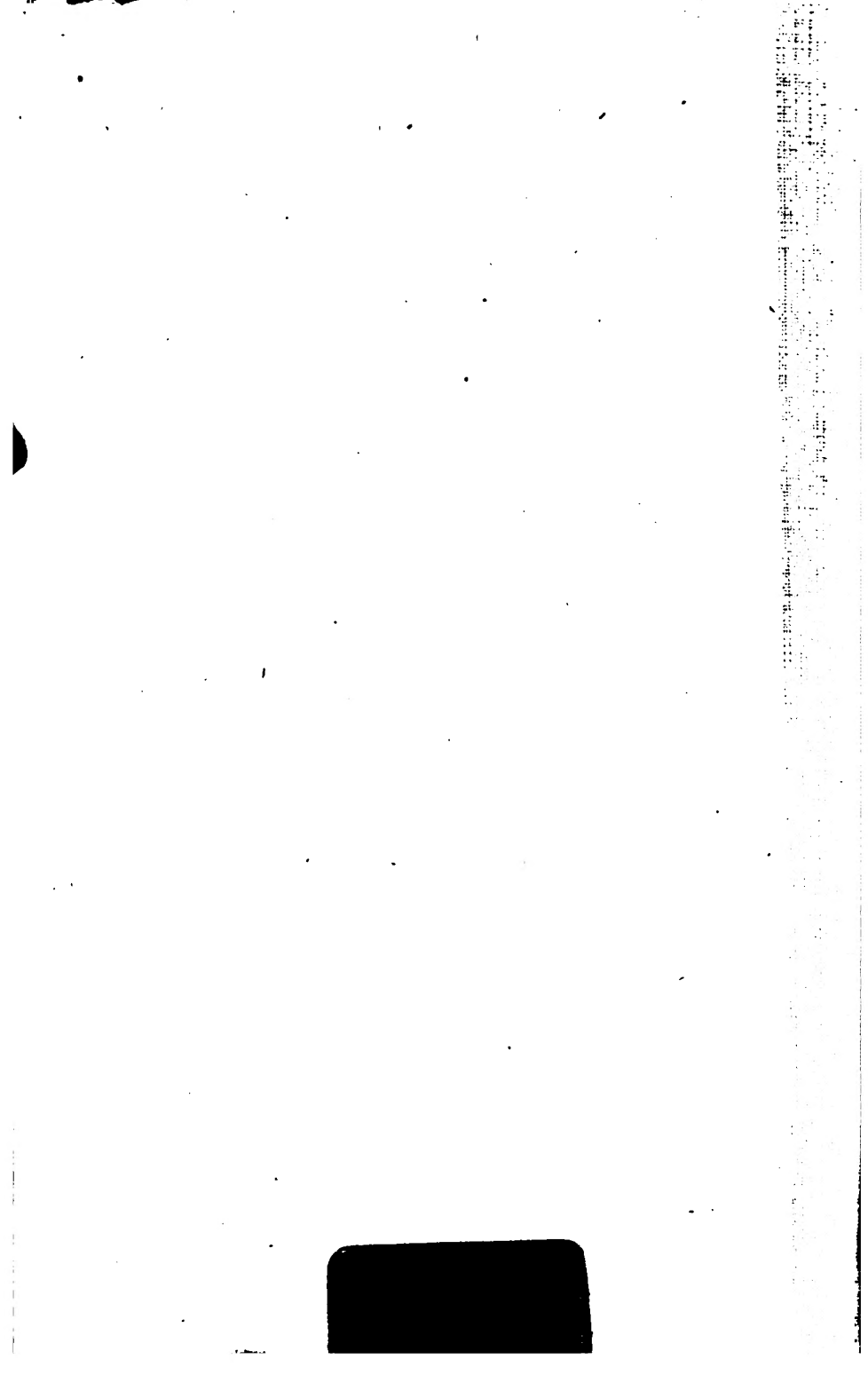
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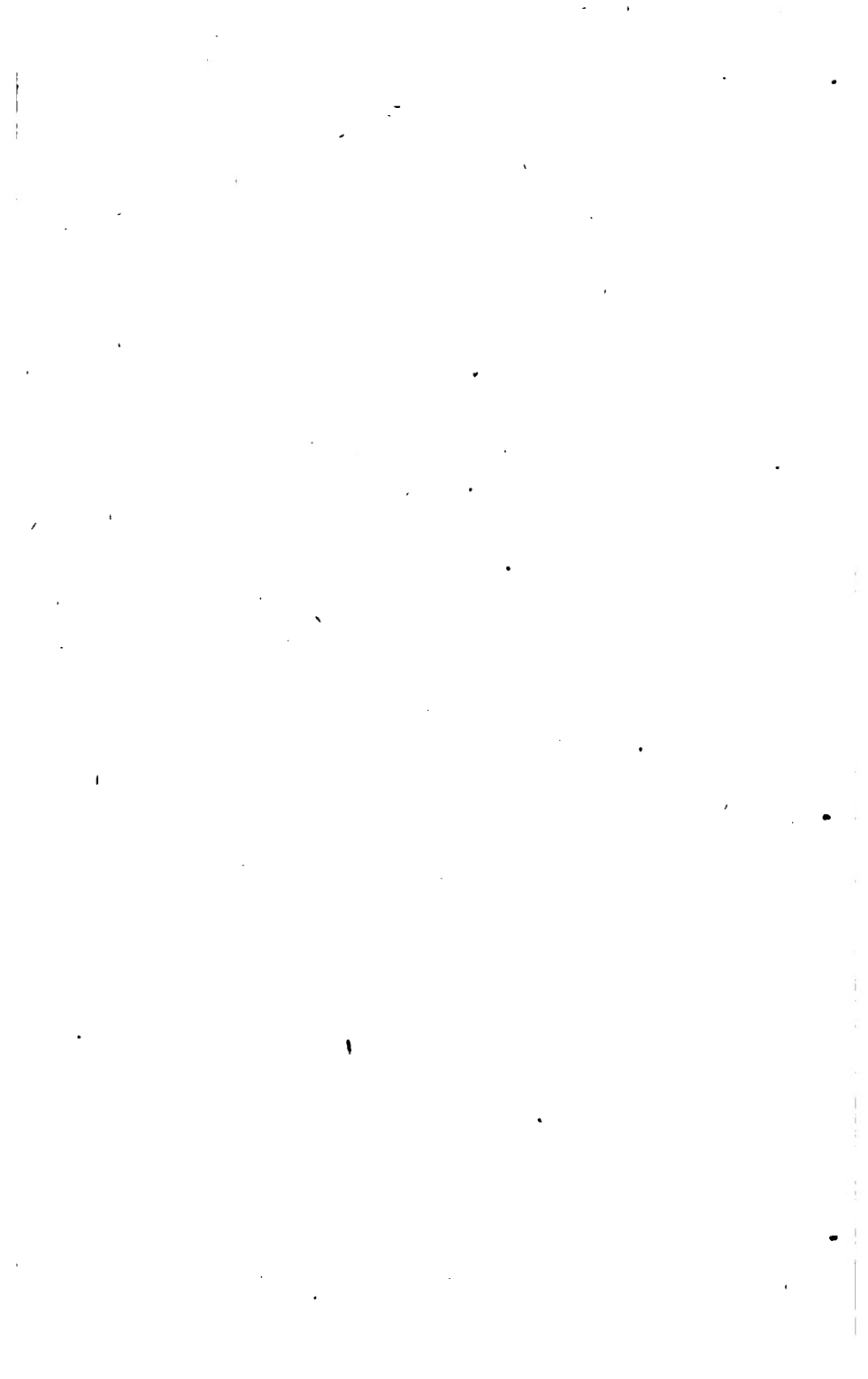
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THE  
**LAW MAGAZINE;**

OR,

**QUARTERLY REVIEW**

OF

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**FOR JUNE, 1828; OCTOBER, 1828; AND JANUARY, 1829.**

**VOL. I.**

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\* \* *The Title Page and Index to Vol. I. are given with this Number.*

# THE LAW MAGAZINE.

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## PRINCIPLES AND PRACTICE OF PLEADING.

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*Speech of H. Brougham, Esq. M. P., on the Present State of the Law.* COLBURN. 1828.

*A Letter to the Right Hon. Robert Peel, on some of the Legal Reforms proposed by Mr. Brougham.* By C. E. DODD, Esq., Barrister at Law. Murray. 1828.

*Suggestions on Practice, Pleading, and Evidence.* By EDWARD LAWES, Serjeant at Law. 1827.

*The Supplement to the Encyclopedia Britannica; Article "Jurisprudence."* By JAMES MILL, Esq. Author of the History of British India.

*Westminster Review, No. VII. Art. 5. Law Abuses and Pleading; No. XI. Art. 3. On Practice and Pleading.*

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It is our intention to comment, hereafter, on all the topics introduced by Mr. Brougham, but the following remarks will be confined to the merits and demerits of pleading; and we regret to say, that, in executing our task, we must place ourselves in opposition to a prejudice now most extensively prevailing.

Beyond the pale of the profession, the present law of actions is universally condemned. The mode of calling the defendant into court, the forms of statement to which parties are restricted, the rules of evidence, and the method of enforcing the decree, are all subjected to reproach; but none,



perhaps, to such unmitigated contempt, as the principles and practice of pleading. "This mischievous mess," says Mr. Mill, "which exists in defiance and mockery of reason, English lawyers inform us, is a strict, and pure, and beautiful exemplification of the rules of logic. This is a common language of theirs. It is a language which clearly demonstrates the state of their minds. All that they see in the system of pleading is the mode of performing it. What they know of logic is little more than the name."<sup>1</sup>

To such ribaldry as this, there is no manner of reply which well-bred persons can employ; but we will endeavour to wipe away some part of the reproach, by departing widely from that method of defence which is commonly adopted by the profession. We shall not seek to intrench ourselves in technicality; we shall not assume the necessity of any particular forms; but descend at once from the vantage ground of precedent and authority, and meet our adversaries on principles of abstract jurisprudence; and we undertake to shew, with as much brevity as possible, that, though overloaded by perverted ingenuity with much that taste and reason would reject, English pleading is founded upon principles as sound as any that reformers can contrive. We shall expose its faults as freely as we shall claim credit for its advantages. Yet we are convinced that the expence, delay, and uncertainty complained of, are attributable to the relaxation, and not to the strictness, of our rules; and that our best exertions should be directed to restore, instead of superseding or extending them. This, indeed, is Mr. Brougham's opinion, and the following observations will afford an illustration of his views. He, however, commenced at a point, to which we should not feel ourselves quite justified in proceeding. He gave our ancestors credit for sense, a commodity most commonly denied them; and took for granted the soundness of the foundations of the system, whilst numerous innovators are for demolishing the whole. We, therefore, shall begin the investigation at a somewhat earlier stage; for we have seen, as yet, no commentary on the writer from whom we just now quoted, nor on

<sup>1</sup> Supplement to the Encycl. Brit. Art. Jurisprudence.

those who have followed in his train. All that we can venture to assume is, the expediency of ascertaining beforehand the nature of the matter in dispute; and it is surely too obvious for denial, that, if parties were to proceed to trial without any warning but a summons to the court, without any species of preliminary arrangement, delay, uncertainty, and confusion would result. In such a case the plaintiff's range of proof would be unlimited; the defendant might be equally diffuse; unacquainted with the precise subject of contention, the judge could form no check upon their wanderings; and neither party could be prepared for explanation or reply.

We are agreed, then, as to the necessity of some sort of pleading, and shall hardly differ as to what are its proper objects; for that system is undeniably the best, which brings the parties most speedily to issue on a point material to their difference, which allows no statements but such as are absolutely necessary to the development of the question, which conveys the fullest information with regard to the proofs required, and provides that these shall be as few as possible; and, above all, which accurately distinguishes the nature of the points in dispute, and refers each to its peculiar jurisdiction; without which, the benefits of a decision must terminate with the suitor who procured it, as no precedent could be relied on as a guide, if fact and law were confounded in the judgment.

By what means these objects are attainable, and what progress towards them our practitioners have made, are the subjects for discussion here, and will perhaps be most easily explained by contrasting the present system with those already tried and those suggested for adoption; and, in the first place, we shall notice a peculiarity which distinguishes our course of proceeding from that of every other judicature.

With us, the allegations of parties are so restrained as to lead spontaneously, as it were, and without the interference of the court, to the production of an issue; whilst, in every other system, a comparative laxity of assertion is permitted, each party states his case at large, and, when all the circumstances of the dispute are fully developed, the pleadings are reviewed by the judge, who selects the material points and frames the necessary issues. The rule chiefly instrumental in pro-

ducing the effect we speak of is, technically expressed, the following; "that after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance;"<sup>1</sup> the meaning of which will be best explained, and the working best shown, by an example.

If A. for instance, were to complain of B., he would set out in writing the ground of his demand, to which B. would be called upon to reply in one of three ways:—by objecting to the sufficiency in point of law of the facts alleged, (i. e. by demurring); by denying the truth of the complaint, (i. e. pleading by way of traverse); or, admitting its sufficiency and truth, by stating facts, which prevent the circumstances relied upon by A. from having the effect attributed to them, (which is termed pleading by confession and avoidance.) If the first course, that of demurring or objecting to the legal sufficiency of the complaint, is chosen, the objecting party is taken to admit the facts, the dispute becomes altogether a question of law, and judgment is given for him in whose favour that question is decided, without requiring any evidence to circumstances. If, according to the second method of proceeding, B. denies or traverses the charge or any essential part of it, the parties are immediately at issue, and a time is fixed for determining the case by proof. But if, declining both of these methods, the defendant confesses the complaint and alleges a new line of circumstances in answer, as, that after the debt became due it was released to him by A.: then a change takes place in the position of the parties, and A. is called upon in turn to deny the truth or legal competency of the defence, or to allege other facts subversive of the effect of those set out by B.; as, in answer to the defence of a release, that such release was extorted by violence; upon which B. is called upon as before to demur, traverse, or state fresh matter; and thus the disputation proceeds, 'till either some essential circumstance is affirmed on one side and denied upon the other, or till the parties mutually admitting the assertions of each other, are at issue as to the legal effect of some one of the pleadings; a conjuncture which in most cases very speedily arrives, and cannot indeed be long protracted by the utmost

<sup>1</sup> Stephen on Pleading, 157.

ingenuity of a disputant.<sup>1</sup> Details of circumstances must occasionally be prolix, as we can neither circumscribe their actual combinations, nor ascertain, beforehand and without a knowledge of the evidence, to what extent an allegation is diffuse; but it is quite impossible to wander from the point or to become illogical without immediate exposure, whilst the rule exemplified above prevails. This, however, it is unnecessary to press; as those whose censures we are most anxious to examine admit the merits of the mode we have described, but deny our courts the praise of following it. They mistake the exception for the rule; they know that a great deal of prolixity has crept in; that various anomalies are discernible; that legal forms appear preposterous to those who are ignorant of the history of our courts; and gladly availing themselves of the facilities of imposition afforded by the intricacies of the inquiry, and often possibly deceived themselves, a certain class of writers have thought proper to inform the public that a whole profession is in league against it, resolved on fostering a practice which has not the semblance of a principle to rest on, but is vague, confused, and contradictory throughout. Here, however, they shall speak for themselves, and we trust the reader will pardon the length of the extract in consideration of the weight of the authority.

“What is desirable in the operation of the first stage is, *1st*, That the affirmations and negations with respect to the facts should be true; and *2dly*, That the facts themselves should be such as really to have the quality ascribed to them. For the first of these purposes, all the securities, which the nature of the case admits of, should be taken for the veracity of the parties. There is the same sort of reason that the parties should speak truly, as that the witnesses should speak truly. They should speak, therefore, under all the sanctions and penalties of a witness. They cannot, indeed, in many cases, swear to the existence or non-existence of the fact; which may not have been within their cognizance. But they can always swear to the state of their belief with respect to it. For the second of the above purposes, namely, that it may be known whether the facts affirmed and denied are such as to possess the quality ascribed to them, two things are necessary; the first is, that all in-

<sup>1</sup> A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another. This is fatal.

vestitive and divestitive facts, and all acts by which rights are violated, should have been clearly predetermined by the legislature, in other words, that there should be a well-made code ; the second is, that the affirmations and denials with respect to them should be made in the presence of somebody capable of telling exactly whether they have the quality ascribed to them or not. The judge is a person with this knowledge, and to him alone can the power of deciding on matters so essential to the result of the inquiry be entrusted.

To have this important part of the business done, then, in the best possible way, it is necessary that the parties should meet in the very first instance in the presence of the judge. A. is asked, upon his oath, to mention the fact which he believes confers upon him or has violated his right. If it is not a fact capable of having that effect, he is told so, and his claim is at an end. If it is a fact capable of having that effect, B. is asked whether he denies it ; or whether he affirms another fact, either one of those, which, happening previously, would prevent it from having its imputed effect, or in a civil case one of those which, happening subsequently, would put an end to the right to which the previous fact gave commencement. If he affirmed only a fact which could have neither of these effects, the pretension of B. would be without foundation.

*Done in this manner, the clearness, the quickness, and the certainty of the whole proceeding are demonstrated.* Remarkable it is, that every one of the rules for doing it in the best possible manner, is departed from by the English law, and that, to the greatest possible extent. No security whatsoever is taken that the parties shall speak the truth ; they are left with perfect impunity, aptly by Mr. Bentham denominated the *mendacity-licence*, to tell as many lies as they please. The legislature has never enumerated and defined the facts which give commencement, or put a period to or violate rights ; the subject, therefore, remains in a state of confusion, obscurity, and uncertainty. And, lastly, the parties do not make their affirmations and negations before the judge, who would tell them whether the facts which they allege could or could not have the virtue ascribed to them ; they make them in secret, and in writing, each along with his attorney, who has a motive to make them not in the way most conducive to the interests of his client, but in the way most conducive to his own interests and those of his confederates, from the bottom to the top of the profession. First, A., the plaintiff, writes what is called the declaration, an instrument for the most part full of irrelevant absurdity and lies ; and this he deposits in an office, where the attorney of B., the defendant, obtains a copy of it, on paying a fee.

Next B., the defendant, meets the declaration of A., by what is called a plea, the form of which is not less absurd than that of the declaration. The plea is written and put into the same office, out of which the attorney of the opposite party obtains a copy of it on similar terms. The plea may be of two sorts ; either 1st, a dilatory plea, as it is called ; or, 2dly, a plea to the action. To this plea the plaintiff may make a *replication*, proceeding through the same process. To the replication the defendant may put in a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*. This, again, the defendant may oppose by a *rebutter*, and the plaintiff may answer him by a *sur-rebutter*.

All this takes place without being once seen or heard of by the judge ; and no sooner has it come before him, than some flaw is perhaps discovered in it, whereupon he quashes the whole, and sends it to be performed again from the beginning.”<sup>1</sup>

Now, in the first place, the reader will have the goodness to observe that demonstration, in this writer’s vocabulary has a very different signification from what it bears in ordinary discourse.

“ Done in this manner,” (i. e. with a code anticipating all possible combinations of facts, and a judge acquainted with each one of its provisions and fully competent to an extemporary application of them) “ the clearness, the quickness, and the certainty of the whole proceeding are demonstrated !”

And what, we should be glad to know, what scheme or theory may not be proved the best, by assuming that every thing is attained which your opponent denies to be attainable ? Fit my balloon, an aeronaut might say, with a machine to raise and lower it at pleasure and a rudder to direct its course, and the facility of travelling in the air is clearly and undeniably made out. Give me a place to stand on, said Archimedes, and I will move the world ; but unluckily he could not find one, and the world continues as it was. Why, a code like that supposed and argued from is what even Bentham never dared to hope for ! We have been told by him, that all the libraries of the Continent could not furnish a collection of cases equal in variety, in amplitude, clearness, and instructiveness, to the English Reports. “ Nor,” adds he, “ to the composition of a complete body of law, (in which, saving the

<sup>1</sup> Suppl. to the Enc. Brit. Art. Jurisprudence.

requisite allowance to be made for human weakness, every imaginable case shall be provided for, and provided for in the best possible manner,) is any thing at present wanting but an arranging hand."<sup>1</sup>

Some lawyers undoubtedly there are with skill and knowledge sufficient to render almost all this store available. Ask one of these if there are precedents enough to decide even a majority of the cases submitted to him; if he is not often driven to equivocal analogies, and often to bare conjecture, or a wavering balance of possible constructions. Every practical lawyer must answer that he is; and yet it is unhesitatingly assumed that no dispute could ever be delayed by doubts as to the legal inference to be drawn from circumstances except by reason of the remissness of the legislature.

Here, however, we are wandering to a topic which may be hereafter the subject of an article, and which it is not necessary to decide on now. Though the system recommended by the Encyclopedist cannot produce the whole of the predicated result unless in co-operation with a perfect code, though under existing circumstances much time must frequently be wasted in settling legal doubts, it is not the less desirable to bring parties to an issue as cheaply and speedily as possible; and, if oral pleading would facilitate the process, it is certainly our duty to adopt it. But before we say one word of its advantages we shall take the liberty of reminding our readers that pleading in the presence of a judge was, in fact, the custom of those ancestors whose wisdom is a by-word for contempt; and that the practice was sedulously adhered to till long experience had made known its imperfections. The parties or their counsel came before the judge exactly as is suggested in the first paragraph of the extract, pursued precisely the same mode of *viva voce* disputation, with the same attention to those rules of logic which are deemed sufficient to make every thing precise, and which are still the foundation of our system. Should authorities be called for, there are enough of them below to establish the truth of the assertion;<sup>2</sup> and, therefore, we are under the necessity of supposing that Mr. Mill was ignorant of the history of our laws; or that he took from thence his beau

<sup>1</sup> Bentham on Codification.

<sup>2</sup> Bl. Com. 293. Reeve's Hist. Chap. 23. Stephen's Plead. 34.

ideal of procedure, coolly assumed the merit of a discoverer, and then set himself to discountenance a system from which all his knowledge of practical pleading had been borrowed.

We are not contending that the method of coming to issue, which we have sketched and quoted above, is any thing more than an ordinary logical operation, familiar even in everyday discussion ;<sup>1</sup> but our proposition is, that no lawyers but the English have reduced it to practice; and that those principles of reasoning, which our adversaries triumphantly contrast, form, in fact, the ground-work of our plan. Of course, as far as mere logic is concerned, it matters little whether A. details on oath or states on paper the fact which, he believes, confers upon him a right ; or whether B. replies *vivâ voce* to a *vivâ voce* complaint, or in writing to written one. The legal effect of the statement may be, in either case, the first subject of inquiry ; and the same mode of denial may be used.

But when, say they, the statement is prepared in secret by the attorney or pleader, it is spun out for the augmentation of their fees, stuffed full of irrelevant absurdities and lies, and thence arise the nonsense and prolixity which now disgrace the administration of the law. Appoint a judge to be present at the process, and the evil is remedied at once.

Such is now the usual method of attack, and the practical lawyer will find no difficulty in discovering the mistake on which such arguments proceed. Because statements are prepared in private and not brought under the immediate consideration of the court until a difficulty is experienced or a flaw is found, it is most unfairly and illogically presumed that forms are all at the mercy of the pleader, to be contracted, lengthened, or mystified, at will. Mr. Mill evidently supposes, or at any rate intends his readers to suppose, that every pleading consists at present of all the seven stages for which the legal vocabulary has names ; of declaration, plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter. The truth, however, is, that at least one-half of modern pleadings consist merely of the complaint and a denial of about four lines ; that very few contain more than three or four stages ; and that there is not so much as a precedent of the

<sup>1</sup> See Stephen on Pl. note 29, where an exact description of the process is given from Quintilian.



seventh (the sur-rebutter) in Mr. Chitty's multifarious collection ; and all who are familiar with the subject know that the seeming remissness of the courts, in leaving to a certain extent the system to itself, is, in fact, a proof of its efficiency ; a proof that it has advanced far enough to dispense with the cost and trouble of a constant control. Every man who draws a pleading is aware that he must be as accurate in the arrangement of his matter as if in the presence of the judges ; before whom, indeed, his composition would immediately be brought, if not legally and formally drawn up. And why should a judge be compelled to listen to all the common-place injuries of which suitors complain ? A. states that B. has not paid him the price of goods sold, or has done some damage to his property. If any inaccuracy or legal doubt appears, let the writing be submitted to the court. But if the claim be merely one of every-day detail, the mode of describing which has been fixed incontrovertibly already, it may surely be made and answered as now, without any check but the private interest of the parties, who will be quick enough in appealing to the court when any rule or *formula* is departed from. Indeed, in all departments of public business similar expedients are resorted to for saving time and diminishing expence. It is dangerous, we know, to allude to the customs of parliament, which will meet with little respect from those whose opinions we oppose ; but if the House of Commons were to discuss regularly each private bill it passes, the work would be never at an end, and the whole time of the legislature would be occupied in adjusting the rights of individuals. How then do they evade the inconvenience ? Why, by taking for granted that, if the parties interested make no objection after receiving due notice of the intended enactment, the provision is necessary and just. A committee is nominated, but all its functions are frequently performed by a single member, who goes through the preliminary forms, and reports the conclusions to the house, which takes the whole that is told it upon trust ; and a noble field for patriotic indignation such negligence assuredly affords. And yet the object is arrived at without imposition or trickery of any sort : for all concerned are informed of the proceeding, and watch it step by step, prepared to publish and vindicate their claims when

the least attempt to infringe them shall be made. Now it is something like this with the proceedings in a cause. The formal statement, of such and such allegations having been made before our Lord the King at Westminster, is all confessedly a fiction. Neither in person nor by his judges does his Majesty control the disputation, which is carried on by an interchange of writings, prepared undoubtedly in private, but prepared with reference to principles and rules which circumscribe the discretion of the counsel as strictly as the court could do; nor does it seem to us illogical to suppose, that the former practice was gradually disused from a sense of the inconvenience of pursuing it.

"Perhaps," says Mr. Bell, "more injustice and oppression is committed by the undue protraction of litigation, in consequence of vague, wavering, unsettled, everchanging statements of fact in a system like the Scottish, than, upon the whole, by erroneous judgments; and nothing is more certain, than that a want of due care in the preliminary process, so as to bring out the true substantial question for judgment, is the great cause of protracted proceedings. It was on this account that the judges in early times were so watchful of the pleadings of the parties—and it was not in Scotland alone that the whole preliminary process, or statement of the pleas, proceeded in presence of the judge. It was so in England also, and their perfect system of pleading is the fruit of it.

"In England, the pleas which are now digested in the form of declaration, plea, replication, &c., were formerly delivered in open court orally by the party or his counsel; and the judge superintending this operation saw the several pleas entered upon the record. Indeed the pleadings, as they are now drawn in England, bear evidence that, originally, they were only the minutes of what was orally delivered, being framed as if they were extracts from the record.

"The Year Books still give evidence of the method in which this operation was performed, and no one can look into Plowden's Commentaries, without seeing how correctly the matter was argued, and how exactly the parties were kept by the judges to the logical exhaustion of the case. It is only in consequence of the long continued care with which judges

superintended this operation, that the system of English pleading was gradually formed, which now works with unerring precision, without the necessity of such superintendence."<sup>1</sup>

But how stands the question of expence, and what greater tax is paid for law in consequence of the alteration? Here, at first, the question is against us. Nothing can appear more plausible to an unsophisticated or superficial reader, than the prospect of a brief adjustment arranged at one meeting by the court; no writings to pay for, no pleaders to employ, no demurrers to argue, nor formalities to fear. But fair and smooth and smiling as it is, a nearer view will dissipate the illusion. In the first place, tribunals must be multiplied to an extent exceeding what any theorist has allowed for. The cases which now come under the consideration of the court are those only in which the application of the law is doubtful, and those which are proceeded with till a judgment is obtained. The number of such is trifling, compared with the cases in which the legal liability is clear and the facts alone are questioned; and those which are settled without coming to trial. Yet in a system of oral pleading every one cause without exception, if carried farther than the service of the writ, would receive a share of the attention of the court, and an increase of judges would instantly be called for.

Certainly twelve able judges are more easily procured than fifty, and a difficulty is even at present experienced in filling the bench effectively. But we will suppose this difficulty surmounted, and fit tribunals established in every quarter of the country. On these the party must attend, and if his statement be straight-forward and plain, he may call on his adversary to plead immediately; the question will be adjusted at a single meeting, and a day appointed for determining it by proof. But under such complicated systems as great and prosperous communities possess, there will frequently be claims which no prudent man could venture to assert without procuring professional advice. Skill and knowledge are still requisite to determine how far particular facts are investitive

<sup>1</sup> Examination of the objections stated against the bill for regulating the Scottish forms of process. By G. J. Bell, Esq. Professor of the Law of Scotland in the University of Edinburgh, p. 16.

or devestitive of rights, even when all these are skilfully defined ; numerous cases would occur, in which time would be necessary to consider the complaint and prepare the plea ; and if the plea contained a fresh development of circumstances, time would again be asked for to consider these ; and thus, with each step of the proceeding, attendances and trouble would increase. We do not deny that in a majority of cases the parties could answer and rejoin immediately, if they would ; but if either of them is anxious for delay, he has for it an unanswerable apology ; for no tribunal can declare, beforehand, that a party who alleges himself to be taken by surprise is, in fact, attempting to impose upon the court, and quite competent to an extemporary explanation.

It is better, we shall be told, to attend the court, than attend a solicitor, and pay him for his writings besides. Most certainly, if you can do without writings altogether, and trust entirely to oral explanation. It strikes us, however, that it would be necessary for the judge to note down with accuracy the statements made before him ; that each suitor would wish to have a transcript of what he had to answer or to prove ; and that a formal record must be filed at the conclusion. Four copies would thus be required, and, if more are charged for now, there is surely no inseparable connection between the system and the abuse. It might have grown up just as well, though oral pleading had never been disused ; and might be removed immediately without interfering with any thing but fees.

What then (and this is a chief object of attention), what is the use of the verbiage with which law proceedings abound ? and would the presence of a judge prevent it ? How happens it that so many absurd fictions are retained ? Why, in one court, is it falsely said at the commencement, that the defendant is in the custody of the marshal ? in another, that the plaintiff is indebted to the king ? Why, in actions of assumpsit, are time and paper wasted in stating promises never made and never cared for in the proof ? Why, in actions to recover property improperly detained, is it invariably asserted, that the goods come to the possession of the party by finding, without regard to the real manner of acquiring them ? and why are Doe and Roe eternally appearing, when-

ever an expulsion is complained of, with a long story about a lease and an ouster, of which no one believes a syllable ? This certainly is indefensible, when viewed with reference to abstract principles of jurisprudence, and we, at least, are not anxious to retain it. Place all the courts upon a par as Mr. B. proposes, and those fictions are immediately disposed of, which are used at present for the purpose of acquiring jurisdiction. Leave out the averment of promises, unless the claim is founded on them. Let the declaration in trover allege merely that the defendant has wrongfully appropriated the property of the plaintiff, and the declaration in ejectment, that the defendant keeps possession of his land. Re-model the forms in this manner, and full as much information will be conveyed as through the medium of the fictions we employ.

What this would save in money we shall by and by compute. That much would be gained in facility of comprehension, we deny ; and as a sort of set-off to the anticipated benefit, we may mention the uncertainty that ensues when wonted modes of construction are departed from ; and though, in the eye of refinement and philosophy, legal lore may be antiquated trash, the task of re-modelling regulations, applying principles, and anticipating contingencies, always was, and always will be, an undertaking of difficulty and time. But we do not press the objection ; we are not to uphold error because its traces are not easily rubbed out ; and if common counts are to be retained at all, they should instantly be cleared of their tautology.

In the next place, is it expedient to allow of declarations, merely stating, in case of money claims, that the defendant is indebted to the plaintiff for money received to his use, money lent to, or paid for, the defendant, &c. &c. without particularity of time or place, or, in short, any explanation of the nature of the transaction out of which the demand arises ?

We own the question to be embarrassing enough, and we are aware that, by allowing the party to call for a more precise description in the shape of a particular, the insufficiency of such statements in affording information is tacitly allowed. Practically speaking, however, a defendant is never taken by surprise, unless by his own remissness ; and the only doubt with us is, whether any evil would result from consolidating

the particular with the declaration and requiring precision in the last; for since the party is restricted by the second paper he delivers, it would seem that he may just as well be restricted by the first. Yet, with really no wish whatever to play the advocate, we are unable to arrive at a satisfactory conclusion, that the advantages of both statements in co-operation might be had by adding them together. We know that the ancient strictness, in this respect, was found very frequently oppressive; and we cannot help thinking that the present mode constitutes a middle point between the preciseness of the old system and the vagueness that would follow from a total relaxation of its rules.

The particular, it will be remembered, does not necessarily afford any information as to sums or quantities, which may be enlarged to any extent beyond the proof; time and place are left as uncertain as before, and it is considered sufficiently precise, however inaccurately expressed, so long as some intimation of the nature of the transaction is *bonâ fide* given; a rule too vague by far to form the foundation of a system.

Supposing, for the sake of argument, that you could infuse into the declaration itself just that additional degree of information which the supplementary statement conveys, you would still possess but a loose sort of *formula*; and it is quite impossible to improve it in precision, without proportionally embarrassing the complainant. We shall presently come to the consideration of the doctrine of variances, and find the same men, now contending for strictness, contending as zealously against it. Yet, how can particularity be enforced except by resolving that the proof shall tally with the statement, to entitle the suitor to recover? Time and place, for instance, can only be made material by requiring them to be proved as laid; and if, after insisting on circumstances, you allow of inaccuracy in detailing them, or permit the introduction of extraneous matter, it will be extremely difficult to assign limits to the indulgence. Yet laws, on the other hand, must make allowance for the occasional imprudence of mankind. Few of us, in the ordinary business of life, consider the transactions we engage in as likely to become the sub-

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jects of a law-suit, and note them down accordingly; minor circumstances are frequently mistaken; and justice will be as frequently defeated, if trifling discrepancies between the allegations and the evidence are held sufficient to defeat the claim. On the one side, is the evil of vagueness; on the other, the evil of severity. Make time, place and quantity material, and right is sacrificed to form. Permit a statement to stand good, with which the evidence has no closer connection than that of conveying the same general impression, and the opposing party is frequently in the dark, unless possessed of extraneous sources of information; ingenuity is exerted to mystify the explanation of the case by adding to one part, subtracting from another, and using a circumlocution for a third; false views are given, deceptive colourings put on, and facilities afforded for garbling the evidence and presenting proofs in unexpected shapes; though at the same time it might be difficult to say, that the party complaining of surprise was really ignorant of the transaction intended by the pleading.<sup>1</sup>

<sup>1</sup> The following is an amusing illustration of the mode in which statements may be generalised by the use of middle terms. It is extracted from a bill filed by one highwayman against another, and of course it was necessary to conceal the real nature of the transaction from the court.

John Everett against Joseph Williams. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c., that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expences on the roads, and at inns, taverns, or alehouses, or at markets or fairs. " And your orator and the said Joseph Williams proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards, the said Joseph Williams told your orator that Finchley in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plentiful at Finchley aforesaid, and it would be almost all clear gain to them: that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards, the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which, he believed, might be had for little or no money; that they accordingly went and met with the said gentleman, and after some discourse they dealt for the said horse, &c.; that your orator and the said Joseph Williams continued their joint dealings together until Michaelmas, and dealt together in several places, to wit, Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex,

Here, then, is the great problem for solution ; and we know no better cure for idle and visionary expectations, than a brief reflection on the nature of these contrasted inconveniences and the results of the attempts to shun them. The ancient particularity was found objectionable, and common counts came in. A sweeping form of denial appeared well fitted to shorten the record, and general issues were almost universally applied. We have non-suits for variance to exclude the possibility of a surprise, and a multiplicity of counts to exclude the possibility of variance ; special pleas to put the plaintiff on his guard, and double pleading for the protection of the defendant. To cover one, the other is unmasked ; the dilemma is not to be evaded ; and we, at least, do not hesitate to avow that we know of none but limited and partial remedies. Such, for instance, is the consolidation of the common counts ; by using which the plaintiff entitles himself to give evidence of almost every species of money transaction out of which a debt can arise, without giving notice of the exact nature of the claim unless a particular is called for. Yet this vagueness of allegation must continue, however vicious its theory may seem, unless all actions of contract are assimilated, and special assumpsits adopted as the model ; a measure which, at first view, seems rational enough. On this head Mr. Dodd satisfies himself by remarking, " That it is nothing to say, why require particularity in declarations of special assumpsit, and admit generality in actions of trover and money had and received. The answer is, the details are given in one action in the declaration, in the other by the particulars of demand ; the end required is effectually ensured by different means." But why rest the point on an equivocal assertion, when a clear distinction may be drawn ? When a suitor is required to specify the terms of an express agreement, he knows the limits of his task, and has a standard to refer to ; but tell him to describe the circumstances which led to the receipt of his money by an-

"and elsewhere, to the amount of 2000l., and upwards." The rest of the bill is in the ordinary form for a partnership account. Our authority goes on to state that it was reported as scandalous and impertinent ; that the solicitors were attached and fined, and that Jonathan Collins, Esq., who signed it, was compelled to pay the costs ; that the plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735, and Wreathcock, one of the solicitors, convicted of robbing Dr. Lancaster in 1735, and transported.



other, and all, comparatively, is arbitrary and vague. Take any one of Mr. Brougham's instances and attempt to act upon his hint, and the difficulty will instantly appear.<sup>1</sup>

In the second and third instances money is paid on a consideration that fails, or on a mistake. Are all the particulars, now left to evidence, to be set out in a preliminary narration? or how much, and what part of them? In the fourth example, is the illegal contract to be pleaded? In the fifth, the fraud upon the revenue? In the sixth, the title of the claimant? or, in the seventh, the relation of the parties, and the various considerations of which the question is composed?

Suppose, however, these particulars set out; we then become exposed to the penalties of variance; no slight evil certainly, but by no means so great as is commonly supposed. It is quite true that, in an action on an express agreement, the essential parts must be set out, and that unless the evidence substantially supports the statement, the action fails, although a contract and an injury are proved. But it is an error to suppose that a technical variance is fatal. When the proof exceeds or falls below the description of the contract on the record, the sole question for consideration is, whether the excess, or the omission, restrains or in any respect qualifies the terms. The common-sense construction is sought out, and on that the judgment exclusively depends.<sup>2</sup> All rules

<sup>1</sup> "Now, observe how various the matters are which may be all described by the foregoing words. In the first place, such is the declaration for money paid by one individual to another, for the use and benefit of the plaintiff; this is what alone the words of the count imply, but to express this, they are rarely, indeed, made use of. 2dly, The self-same terms are used on suing for money received on a consideration that fails, and used in the same way to describe all the endless variety of cases which can occur of such failure, as an estate sold with a bad title, and a deposit paid; a horse sold with a concealed unsoundness, and so forth. 3dly, the same words are used when it is wished to recover money paid under mistake of fact. 4thly, To recover money paid by one person to a stakeholder, in consideration of an illegal contract made with another person. 5thly, Money paid to revenue officers for releasing the goods illegally detained, of the person paying. 6thly, To try the right to any office, instead of bringing an assize. 7thly, To try the liability of the landlord for rates levied on his tenant. What information, then, does such a declaration give? It is impossible, on reading this count, to say which of the seven causes of action has arisen; and it is not merely those seven, for each one of them has a vast number of varieties, which are declared on in the same words."—Speech, p. 70.

<sup>2</sup> See Selwyn, N. P. 102. 116. 5th edit.

must occasionally be harsh to suitors just within them : but if any thing like accuracy is desirable to guard against the chance of a surprise, what maxim more lenient can there be than that which we have just alluded to ? And surely it is far better to limit the discretion of the judge by rules, the application of which may be in some measure anticipated and calculated on, than to vest in him, as Mr. Brougham proposes, an uncontrolled power of declaring at the trial whether statements are precise enough or not ; a power which would be constantly appealed from, because each decision would be looked upon as an arbitrary fiat with no better basis than private opinion ; and because no man can be competent to declare how far concealment was the object of one party, or to what extent the other was imposed upon. There should be, moreover, an uniformity of practice in our courts ; and what sort of resemblance would there be between the constructions of a judge with the habits of an advocate, and of one nurtured in the mysteries of pleading and convinced of the expediency of strictness ? Can any man of observation doubt that Mr. J. Burrough would find material variances where C. J. Best would be unable to discover them ? — that the one would ridicule objections which the other would immediately admit ?

We would retain, therefore, the present particularity in actions on special contract, with the rules by which it is enforced ; though with a full conviction of the evils that spring out of them, and the expensive precautions they require. We allude of course to the employment of several counts in the same declaration, in each of which the same case is described with some slight shades of difference, so as to meet any shape which the proofs may assume at the trial ; a custom which has certainly been abused, most frequently from excess of caution, and now and then to add to the expence. The obvious origin of the practice is, the licence given to suitors to join several causes of the same nature, instead of bringing a separate action for each ; and so long as this privilege continues, a complainant cannot be compelled to confine himself to a single statement of a single case, as the additional counts could in no case be struck out for similarity without the risk of infringing on the right. But, without reference to this peculiar difficulty, we would permit the same case to be differently

stated for the avowed purpose of meeting varieties of proof. Some such mitigating expedient must be employed, or the rules of variance will be too severe; and surprise is effectually excluded, when all the shapes in which the charge can be proved are clearly presented to the view, and correspond in number with the counts. The expense indeed of such cumbersome machinery is an object of rational alarm; and there are no means of materially diminishing this, except the forbearance of the draftsman and the careful superintendence of the court. A party who employs useless repetitions is liable to the costs of the excess; but the court must exercise a more peremptory check than taxing the pocket of the suitor, who acts entirely by the directions of his professional advisers; and it is really preposterous to suppose, that, when special retainers are of frequent occurrence, and three or four counsel are commonly employed, litigants will voluntarily incur the slightest risk of failure to save a pound or two in pleading.

We have been speaking mostly of declarations in contract, but our remarks are generally applicable. What we have said of common counts on promises, may be said as well of the comprehensive forms in trover. Prune away the unnecessary words, and state simply that the defendant has in his possession certain property of the complainant which he has applied to his own use; and trust to the particular to exclude surprise. The conversion is here the main point; like the sale of the goods, the performance of the work, the receipt, payment or lending of the money, or the accounting, in the other cases in which precision is dispensed with; and these are facts, to elucidate which particularity is highly desirable, but may be bought too dear. It is easy enough to say, that, in suing for the price of goods, their number, quality and value should be given; when there is not a man who calls for the improvement but would cry shame on the proceedings of our courts if they gave judgment against the vendor, because he claimed for twenty, and proved the sale of ten; because he dated the transaction in January, and his witness placed it in June; because he described the sale as taking place in Cheapside, though it actually occurred in Fleet Street; because he valued his property in pounds, and the proof was positive to guineas. Be then critical, but be consistent in your criticism.

Enjoy your laugh at the pleader if you will, when, in suing for property, he inserts hundreds for tens; or, in declaring for a wrong by violence, exaggerates a smack in the face into "divers kicks, blows, and strokes on the head, face, eyes, nose, ears, arms, legs, breast, and back;" or the breaking down of a hedge into "breaking down divers gates, fences, and hedges, and trampling upon, consuming, and spoiling the grass and corn of the plaintiff," &c.; or, in an action to recover a cottage and an acre of land, claims "messuages, dwelling-houses, cottages, barns, outhouses, gardens, pasture, arable, meadow, and wood lands." This, we know, is miserable stuff, and may add some shillings to the costs; but you can form no rule to reach it that will not go too far; you cannot controul the vagaries of invention, without pressing hard on unintentional mistake.

The Pleas are the next topics of discussion, and these are divided into pleas in abatement, and pleas in bar. The effect of the first is, merely to defeat the present proceedings; of the latter, that the plaintiff cannot maintain any action at any time in respect of the alleged ground. They succeed each other in the following order:<sup>1</sup>

1. To the jurisdiction of the court.
  2. To the person of the plaintiff; as that he is legally incapacitated from commencing or continuing his suit.
  3. To the person of the defendant; as that she is a married woman.
  4. To the form of the writ; as misnomer of the plaintiff or defendant, or the misjoinder or omission of parties.
  5. To the action of the writ; as that it was brought as for a wrong by force, when it ought to have been on a contract.
- And lastly, pleas in bar to the merits.

This order must be carefully attended to, as, by pleading any one, the defendant is precluded from resorting to those which rank before it. Thus, the second plea admits the jurisdiction of the court; the fourth admits the jurisdiction and the competency of the parties, and so on; but by taking each in regular succession the party may avail himself of all. We say, *MAY* avail himself, because the employment of all is

<sup>1</sup> We omit the plea to the count because no longer practicable.

barely within the range of possibility, and not by any means discretionary in the defendant. The Westminster Reviewer, in allusion to these defences, is pleased to say,<sup>1</sup> "Being at length driven from all these outposts and obliged to answer the plaintiff's demand, he (the defendant) has still several other expedients in his power for delaying and harassing his opponent." But this gentleman forgot to prove that the grounds of objection thus pleadable are really immaterial or illogically arranged; he forgot to mention, that the objecting party must, in most cases, furnish the means of correcting the mistake, (for instance, a plea of misnomer must state the true name or names, and a plea of misjoinder the proper parties); that if the defendant pleads anything not apparent on the face of the proceedings, nor within the knowledge of the court, (i. e. any matter of fact) on which issue is joined, and found in favour of the plaintiff, final judgment is given for the latter; though had the point been found against him, it would have concluded, not the merits, but the writ. And lastly, this gentleman thought proper to pass by, entirely, the enactment,<sup>2</sup> "That no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court, to induce them to believe, that the fact of such dilatory plea is true." How, therefore, all the outposts could successively be occupied, with such barriers placed around them, except by a concurrence of blunders almost miraculous, we really cannot see; and we are equally blind as to the "other expedients" improperly allowed. One is mentioned, however, and we will take it up here, in order to clear the way for the more solid objections of Mr. Brougham, and because it is very easily disposed of.

The privilege of making objections merely formal, is looked upon as an instrument of oppression, of which the suitor should be instantly deprived; and the objection is made without so much as an allusion to the mode in which the practice is controlled. For any thing to the contrary stated by Mr. Mill, or by his admirer and disciple in the Westminster, one might suppose that no such things as amendments had ever been heard

<sup>1</sup> No. XI. p. 46.

<sup>2</sup> 3 Ann. c. 16. s. 11.

of; that a false step was irretrievable: and that pitfalls were insidiously contrived to entice the unwary to destruction. Yet on referring to the books of practice, it will be found, that many technical inaccuracies are cured by pleading over; that proceedings may be amended at any time before judgment, not merely after the objection has been made, but even after its validity has been discussed: and that, unless a party perseveres in error from downright obstinacy, or thinks proper to contest the point, no case can be decided upon a technical defect.<sup>1</sup> Thus, taking Mr. Stephen's example, triumphantly cited in the Review, suppose the time of committing a trespass to be omitted in the declaration. The defendant demurs, and points out (as he is obliged to do) the particular fault. Why does not the plaintiff amend? Because he has no merits. There can be no other reason, and it is idle to talk of the injustice of a decision, which the supposed sufferer has forced upon the court. The question, in short, is simply this, whether all rules and formulæ shall be dispensed with, to save suitors the cost and trouble of correcting their blunders, when those blunders are clearly pointed out; and "that some forms," to borrow Mr. Serjeant Lawes' expressions, "must be put upon the record is quite evident, unless it be intended to turn the superior courts of law into courts of conscience and police offices. Well settled precedents always have been, and must ever be considered as the very touchstone of the law. Without some record of the facts charged and adjudged upon in civil as well as criminal cases, there can be no security for the consistent

<sup>1</sup> At any time before judgment, in ordinary cases, the proceedings may be amended by a judge at chambers, upon summons calling upon the opposite attorney to shew cause, why the party applying should not have leave to amend; in other cases the amendment may be obtained by application to the court. Also, the judge at *nisi prius*, upon application, may allow the record of *nisi prius* to be amended, and may order the clerk of *nisi prius* to amend it instantane, whether the judge who tries the cause be a judge of the court in which the record was made up or not, provided the defect be not in a material allegation, of which the party must have been apprized, and which he might have amended before trial.

After demurrer, general or special, it is usual to give the other party leave to amend, and it has been given, even after demurrer argued, but before judgment, where the justice of the case required it. 2 Archbold's Practice, 262—279.

All technical mistakes and omissions are cured by verdict or judgment by default.

administration of justice, either as it concerns life, liberty, or property."

So much for dilatory and technical defences. We now come to pleas upon the merits; and here the attempts made from time to time by the legislature and the judges to diminish the grievance of prolixity, have been productive of the worst results. We have stated already, that a majority of pleadings consist merely of the complaint and a brief denial of its truth; and this is the very evil we complain of. According to the strict principles of pleading, the defendant should make his choice between demurring, traversing, and confessing and avoiding, as explained at the commencement of these remarks. He should have it in his power to put the plaintiff to the proof of the complaint; but new facts and legal objections should stand alone, and be accurately explained. In many forms of action these principles are still attended to. In covenant, and in debt on instruments under seal, there is, properly speaking, no general issue. The most comprehensive form of denial that can be employed is, that the writing declared on is not the defendant's deed; under which, he can merely contest the fact, or the validity, of the execution of the deed. Any other defence must be particularly set out. In *formedon*, *quare impedit*, *detinue*, and *replevin*, the plaintiff has notice from the plea of the intended line of defence; and in trespass, to land, goods, or for personal violence, there is little reason to complain of its generality. In these actions, the general issue puts the plaintiff to the proof of the act alleged; and, as the case may be, that the lands or goods were his. If the violence was actually committed and the plaintiff legally possessed, and the justification is, a licence, right of common, or right of way, or that the act was done in aid of an officer, in pursuit of a felon, or to remove a nuisance, a special plea is necessary. Even here, however, there are occasional departures, owing chiefly to the intervention of the legislature. By express enactment, a distress for rent may be given in evidence under the general issue. Magistrates and most public functionaries are privileged in this respect, and may avail themselves of the general form of denial in actions brought against them for any thing done by virtue of their offices, and shew

the special matter in evidence. A provision of the same nature now most commonly accompanies the grant of authority of any sort ; and such cases are not improperly excepted, as an undue exercise of power is too notorious to take any one by surprise. But to prevent the possibility of perversion, it might be advisable to compel the officer or magistrate to give notice that he justifies as such, without setting out the precise nature of his authority.

No such partial remedy, however, will cure the vagueness of the usual plea in *assumpsit* and *case*, in which law and fact, denial and confession, are confounded. So glaring, is the aberration from principle, that we must look about to account for the departure, or we shall find it difficult to maintain that we ever had a plan. The truth is, the application of the action of *assumpsit* to cases in which no promise has been actually made, is a comparatively modern invention. The proper remedy in such cases was the action of debt, formerly objectionable on account of the precision required in the proof, and the privilege allowed to the defendant of clearing himself by *wager of law*. To evade its inconveniences, the courts resorted to the fiction of implying a promise when a cause of action was established. Thus every circumstance affecting the liability becomes matter of consideration before it can be decided whether a promise has been made or not, and the general issue (*non assumpsit*) comprises necessarily every species of defence. To declarations on actual promises the general issue is not, in principle, so comprehensive ; and grounds of discharge, occurring subsequently to the engagement, are not included in the terms of the denial. Yet led away by a supposed analogy, the courts have suffered express *assumpsits* and implied to be assimilated. With very few exceptions the defendant may now resort to every species of defence, without affording the least hint of his intentions ; and (stranger still) he has the option of pleading specially, which he thinks proper to lengthen the record.

Now the use of pleading, as we formerly observed, is to throw off superfluous matter, to gain the advantage of mutual admissions and lessen the quantity of proof, to evolve the points of contention, and, by separating law and fact to draw a broad line of demarcation between the provinces of the jury and the



judge. Yet, in an action of general application, particularly to mercantile transactions (the most complicated perhaps of any), no warning is given, no disentanglement is made; but parties are left to guess the tactics of their adversaries, and grope their way to the encounter as they can. The judge at *nisi prius* is called upon to decide a legal doubt, and begs leave to postpone it for the court. A plaintiff is tricked by a defence which fair notice would have enabled him to expose, and a new trial is allowed of course. Instead of having a verdict to abide by, the parties come to town with their attorneys, and linger out the better portion of the term; and when they get back, witnesses are to be resummoned, preparations for the assizes made anew, and refreshers administered to the counsel. Delays and costs accumulate; yet because a final judgment is eventually obtained by a long, painful and hazardous procedure, we are gravely informed that, "though it should seem as if much confusion would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other."<sup>1</sup>

It is not, cannot be so. Here at least the great commentator has erred. Experience proves what prudence would anticipate; and there was in his time, and there is in ours, no wrong so grating to a litigant whose property is wasting in a suit, as to come close to a definitive decree, and be thrown back upon uncertainty again; to approach the conclusion of his pilgrimage, and find the commencement of a new one; to ask for quiet, and be fed with hope; to be dragged along from one tribunal to another, without a refuge from the tortures of anxiety except in the stillness of despair.

We speak from experience, when we say, that the unwillingness of judges individually to decide points of law arising on the circuit, and the frequency of applications to the court for the reversal of such decisions as they venture on, are fruitful sources of procrastination and expense; and that these would most materially decrease if the strict rules of pleading were restored. We would rather adopt the maxim of singleness to its full extent; we would rather compel the defendant to take issue on a single point in the declaration, or to confess the

<sup>1</sup> 3 Bl. Com. 306.

whole and confine himself to one mode of justification, than proceed any longer in the system we are following. Suppose a case similar to that mentioned in our article on mercantile law,<sup>1</sup> and conceive what defences may be made. When stripped of its complicated machinery, the transaction, as is truly observed, is neither more nor less than a simple sale ; but points of contention may arise, relating either to the quality, quantity, or management of the goods, the conduct of the broker, or the extent of his authority ; a bankruptcy, an insolvency, a right of lien, the mode or fact of payment, &c. &c. A release, accord and satisfaction, or former recovery for the same cause, may also be relied on by the individual on whom the contract is sought to be enforced, with other grounds it would be tedious to particularize. Whatever they are, good pleading would elucidate them, whilst the general issue hangs a cloud upon the whole.

In permitting, therefore, the defendant to put the plaintiff to the proof of all the material averments in his declaration, we certainly go far enough ; but when these are logically, they should be legally, admitted, and a plea in avoidance should necessarily confess. The general issue should be restricted to its proper sense, operate simply as a denial, and always stand alone ; and defences resting on extraneous matter, on facts subversive of the effects, though consistent with the occurrence, of those relied upon by the plaintiff, should in all cases be specially set out. To the case of an implied assumption these suggestions apply but partially ; as a simple denial necessarily involves the whole merits ; yet even here we might do something, by requiring certain established modes of defence, (release, accord, payment, &c. &c.) to be specially pleaded. The number of answers to be allowed together is rather difficult to fix. Considering the uncertainty of proof, and how very frequently a case may fail on which the party had every reason to depend, we see no objection to admitting two special pleas to a complaint, without a reference to the court or a preventive check of any kind except the liability to costs ; and we may repeat our former observation, that, though attention is distracted by variety, unfair surprises are prevented by an exposure of the utmost that can be proved. In no case, how-

ever, should leave be granted to resort to more than two defences, or to plead a special plea in addition to the general issue, except on actual motion and cause shewn. With regard to the replication too, there is no reason why some such rule should not prevail. If the defendants plead infancy, for example, the plaintiff may reply either, that the defendant was not an infant when the transaction took place, that the goods were necessities suitable to his degree, or that he promised to pay for them since he came of age. There may be cases when it would be quite equitable to permit each of these points to be made, for the purpose of overthrowing a fraudulent defence; and therefore we would vest in the court the power of licensing a double or treble replication.

One more alteration, and we have done. Mr. Brougham suggests the expediency of allowing demurrers unaccompanied by an admission of facts; an amendment we would certainly adopt, since at present a suitor who is conscious of a material error in the pleading, lies by and takes his chance upon the proof, and then moves in arrest of judgment. When it is no longer necessary to admit the facts, legal objections will be taken at the outset; and the heaviest charge of all, the expence of trial, will frequently be saved.

Having now traced the outline of the system, and commented freely on its prominent defects, we would willingly conclude, were it not for the queries we proposed, and the pledge we gave, at the commencement. We have wandered over an interesting field, and pursued with care an intricate inquiry; noted much; and reflected upon more; but we have kept in mind throughout the points that are wanting to the argument. We know that we have yet to prove that oral pleading is open to prolixity, to formal flaws, and expensive disputation and that imposing oaths on the litigants themselves would not exclude a multiplicity of allegations nor curtail the proceedings of a suit, without introducing a most iniquitous severity. On these particulars we shall be extremely brief; and, at the outset, we are quite willing to admit that there is one high authority apparently against us; that Lord Hale was of opinion, that the present practice had been productive of delay. But he, it must be borne in mind, was contrasting oral pleading conducted by counsel, with the ver-

bose precedents and extreme strictness of his times.<sup>1</sup> Our affair is with very different considerations, with the evils necessarily arising from the *viva voce* contentions of the parties themselves, and those of a system like our own, when made consistent with its principles. Mr. Mill will hardly support his views by appealing, with the Chief Justice, to our ancestors, for they depended upon lawyers to whom the good or evil of their law proceedings is attributable. He must rest his system upon common sense, on the every day experience of society; and here it is that we hasten to encounter him.

May we first, without impertinence, inquire of those, who hope to simplify contention by bringing suitors into contact with each other and compelling each to turn pleader for himself, whether their attention was ever drawn to the mode in which men in general are wont to mingle in dispute, to the confusion and vagueness that prevail, to the strange wanderings and irrelevant remarks it is almost always the fashion to indulge in? Did they ever listen to a passionate complaint, or mark the glosses that are put upon a tale when the hero or heroine relates it? Did they ever take instructions for a brief, or act the part of arbitrator? If they have done this, or any part of it, they may well conceive the nature of details which mutual altercation would bring out. The judge might ask A. to mention the precise fact which he believes confers upon him, or has violated, his right, and A. would favour him with ten; or rake up the whole life of his adversary, with the rise and progress of their connection. Check him, and the court would place itself in a predicament in which our readers may now and then have found themselves, that of being extremely eager to sift a story to the bottom, and seeing clearly the impossibility of getting at it without falling in with the humour of the teller. If a man is to be limited in proof to the matter of his preliminary allegations, he will make the charge as sweeping as he can; and the answer will be equally diffuse, with equal claims to be so. The judge, however, must remember or note down the whole, arrange the topics, and fix their essentials; and, unless form and precedent are henceforth to be valueless, must give the statement a regular construction. In short, we impose upon the judge the proper

<sup>1</sup> The middle age of pleading was decidedly the worst.

task of pleaders and attorneys. Instead of presenting the kernel of the case, we tell him to extract it from the shell, and expect, forsooth, that he will mark intuitively the remotest bearings of every thing he hears.

It is not, it should be remembered, at a single consultation that the material points of a case can be procured by a solicitor; for a legal liability is much more frequently to be deduced from a chain of circumstances, than found dependent on an insulated fact, and over-anxious clients will declaim, and colour and palliate for hours, even to their own agents. We cannot help thinking, therefore, that men in general would soon discover their own incompetency, and come over to Lord Mansfield's opinion, that he who is his own lawyer has a fool for his client. The failure of a few would teach wisdom to the many; and the result of this notable project would be the practice of reading in court mere formal statements professionally prepared, to be afterwards copied, and recorded as now.

With regard to the imposition of oaths, we have laid down already some principles for deciding on the point, though it is extremely difficult to meet suggestions so vaguely and generally thrown out. To what must the suitor swear? To a belief that all he says is true? or to a belief that the grounds on which he rests his case are all essential to support it?<sup>1</sup> In verifying dilatory pleas, an affidavit may be reasonably demanded; because, in each of these, a precise fact is relied upon, and no variety of allegation is required. But we have shewn the reasons of the law of variance, and the mode of mitigating its severity; and no recent writer has ventured to maintain that strict singleness in pleas should be enforced; so that, if an oath more binding is proposed than one to the effect that the party really expects to be aided by his allegations and does not make them for vexation or delay, if Mr. Mill wishes for a more severe restriction, we appeal to our former reasonings against it. If on the other hand, he would rest satisfied with this; the answer is, its utter inutility. Multifarious statements have always an apology in the proverbial uncertainty of proof; convictions for perjury are out of the question; and we should

<sup>1</sup> At Athens each party swore to the justice of his case. Jones's Pref. to Issues, 21.

hope but little from the conscience of a party, who would coolly plan the protraction of a suit, and rest his hopes on the ruin of his adversary.

We have not space for more, not even to sum up our observations ; but one broad distinction we deem it necessary to draw, as it may serve perhaps to elucidate our views. We think not so much of the direct as of the consequential evils of pleading ; not so much of the money paid for writings, as of the expense occasioned by their want of accuracy and fullness. Should the improvements we have alluded to be made, we believe that fewer witnesses and proofs would be required ; that new trials, special cases, and extraordinary applications to the courts, would very considerably decrease ; but we can hold out no hope whatever of records much shorter than we have. The amendments alluded to by us, and suggested by the writers we have quoted from, are meant to amplify conciseness as well as to cut down tautology. In a declaration for the price of goods, for instance, we might save about two guineas by consolidating the counts ; but this saving would be counterbalanced by an additional charge for pleas, were the general issue more sparingly employed.

Pleading, however, with all its faults, is not the bugbear the public may suppose ; and to assert that “ all the expenses in a suit which are not incurred in summoning or taking the defendant into custody, in employing counsel, and collecting and adducing evidence at the trial, or enforcing the decision of the court, are produced by the present mode of pleading ;”<sup>1</sup> is about as conclusive as to say, that all the expences of building a house which are not incurred in laying the foundation, raising the walls, putting on the roof, and completing the interior, are incurred by the erection of the scaffolding. All systems of preparatory procedure must be attended by numerous inconveniences ; but were they ten times worse, we must endure them, till fraud and error and obscurity are gone, till the wants of society contract, whilst all its relations are extending.

<sup>1</sup> Westminster Review, No. XI. p. 62.

## REFORMS IN CHANCERY.

*A History of the Court of Chancery, with Practical Remarks, &c.* BY JOSEPH PARKES, Solicitor, Birmingham. 1828.

*An Enquiry into the Present State of the Civil Law of England.* By J. MILLER, Esq. 1825.

*Copy of the Report made to his Majesty by the Commissioners appointed to enquire into the Practice of Chancery.* 1828.

ALTHOUGH the Court of Chancery has long been a fruitful theme for discussion, we are inclined to believe that the notions of by far the greater portion of disputants, with respect to the real nature of its abuses, are extremely vague. This confusion of ideas is mainly attributable to the manner in which public attention was first attracted to the subject. A court, in which Lord Eldon presided, was a tempting object for the attacks of opposition: charges were made with too much asperity, and repelled with too much confidence; and, both in and out of parliament, it became a matter of course for Whigs to assail and Tories to defend the Chancellor. The consequence was, a belief, on the one side, that the alleged evils did not exist, or were not susceptible of cure; on the other, a very general opinion, that to the judge were traceable all the delays of the court, and that to remove him, was to correct the vices of his tribunal. Literary discussion on the subject, long confined, with few exceptions, to the daily and periodical press, has at length assumed a more tangible character in various publications of high pretension, and, generally, of unquestioned talent. Among them must be particularized the able and candid "Enquiry into the present State of the Civil Law of England" by Mr. Miller, and Mr. Parkes' "History of the Court of Chancery." These, and the evidence appended to the Report of the chancery commissioners, while they contain ample information on every branch of the inquiry, are too bulky to tempt the merely curious to a perusal. To lay before the general reader a concise view of the existing state of the court as represented in these publications, the most obvious causes of delay and consequent expense, and the most feasible plans that have been from time to time suggested for their removal, is the object of this article.

The causes of delay may be divided into such as spring from the inadequacy of the court to transact the business brought before it, and such as arise from the defective mode of its procedure. The remedies also are of two kinds; the one being within the powers of the court itself, the other requiring legislative interference. The whole subject will be most clearly elucidated by a brief sketch of the constitution of the court, and of the principal rules by which the ordinary progress of a suit was guided prior to Easter term last.

There are in England two supreme courts of equity, the High Court of Chancery, and the Exchequer; in the latter except tithe suits, little business of importance is transacted. The former is composed of three tribunals, respectively presided over by the Lord Chancellor, the Master of the Rolls, and the Vice Chancellor; before either of whom may be brought any case, except such as relate to lunatics, which must be heard by the Chancellor. The Vice Chancellor is compelled to hear all matters which the Chancellor may direct, in addition to those originally set down in his own court: the decrees, orders, and acts of the former are liable to be reversed, discharged, or altered by the latter. The sittings of the Master of the Rolls amount during the year to about one hundred and twenty, of four hours each; those of the other judges, to about two hundred, of six hours each; from which must be deducted, during the session of parliament, two and often three days in the week, on which the Chancellor presides at the hearings of appeals in the House of Lords. The Chancellor is also much occupied as speaker of the House—in giving his advice on the cases of condemned criminals reported to his Majesty by the recorder of London—in occasional attendances at the meetings of the privy council—in examining treaties, conventions, charters, letters patent, and the numerous instruments which pass the great seal, for the legality of which, and the accuracy of their contents, according to the warrants upon which they are founded, he is responsible—in much that relates to the administration of justice by others—and in such judicial and other business of his office as is transacted by him, but not in court.



The subordinate officers of the court are, the masters, six clerks, registrars, and commissioners of bankrupts. The masters are twelve in number, including the master of the rolls, and accountant general, or superintendant of the funds in court. The duties of these officers (who formerly had a seat on the woolsack in the House of Lords, and are still employed there, chiefly in carrying messages to the Commons) are to enquire into alleged impertinence or scandal in any bill or answer, and into the sufficiency of any answer or examination—to take accounts of executors, trustees, and others—to enquire into and decide upon the claims of creditors, legatees, and next of kin—to appoint receivers of the proceeds of estates in litigation, fix their salaries, and examine their accounts—to sell estates—to appoint guardians, and allow proper sums for the maintenance of infants—to appoint committees of the persons and estates of lunatics—to decide upon the sufficiency of titles, and tax the cost of all proceedings in court<sup>1</sup>—they are always chosen from the bar. The six clerks are the only recognized attornies for conducting equitable suits, and by one of them every party in court must be represented. They file bills, answers, and other records; each of them is allowed twelve assistants, that is, ten sworn (sworn not to pillage the records), and two waiting clerks; and by these, all the business of the court was transacted previous to the year 1729, when attornies in general were admitted, since which, their numbers have dwindled from seventy-two to eighteen. There are four registrars, two entering registrars, and eight clerks, from whom vacancies are supplied. The four registrars sit in turn before the three judges, and take notes of all orders and decrees, which are afterwards entered in the general register kept in the office; they also make and sign copies of decrees for parties who may require them.

Commissioners of bankrupts, seventy in number, are appointed by the Chancellor, and removable by him at pleasure. They are equally divided into fourteen lists, each list forming a court. To these all commissions against persons residing within forty miles of London are directed, and it is their part to examine into the affairs of bankrupts; seize their persons and property; receive proofs of debts, and appoint assignees.

<sup>1</sup> Chancery Report.

All their proceedings are subject to the revision of the chancellor.

A suit in chancery is commenced by bill in the nature of a petition, praying relief, and a subpoena to compel the defendant to appear and answer. The bill having been filed, a writ of subpoena issues, commanding the defendant, under penalty of 100*l.* to appear personally on a certain day, wherever the court shall be, "to answer those things which shall be then and there objected to him,"—on it is endorsed, "at the suit of A B." If the defendants are numerous, it is usual to insert three names in each subpoena; service being effected by leaving a label, and shewing the body of the subpoena to the two first, and leaving it with the last. To enforce obedience to this writ, five different processes may be necessary, each having an interval of fifteen days between its teste and return. After appearance, six other processes of similar duration must be issued before the allegations in the bill can be taken as confessed by the defendant. Having appeared, the defendant may demur, plead, or answer all, or any of them. If he answers, the plaintiff is allowed two terms, with the vacations (about three quarters of a year) to file exceptions, that is, to object to the sufficiency of the answer. To these exceptions the defendant either submits, in which case he is allowed six weeks to put in a better answer, or he suffers them to be referred to the master, who hears the parties by their counsel, and reports his opinion upon the question to the court—from this decision an appeal lies to the court itself.<sup>1</sup> The second answer, which may also be excepted to, having been put in, the plaintiff is allowed to amend: for this no period is limited, and he may in fact do so at any time before the bill is open to dismissal for want of prosecution (which is analogous to a nonsuit at law), by a simple allegation that he is advised to amend. In some cases he may, even after replication, move for leave to withdraw his replication, and amend, though nearly six terms have elapsed since the answer. Amendments generally require a further answer, and a repetition of the proceedings above noticed. After the bill has been fully answered, although no step be

<sup>1</sup> A defendant may put in four insufficient answers; after which he is interrogated as to particular points, and committed until he has answered perfectly.

taken by the plaintiff, the defendant is not entitled to call for a dismissal of the bill until the expiration of a period of three quarters of a year; the plaintiff may then, by filing a replication, gain a further delay of equal duration; after which, he undertakes to "speed his cause," and at the expiration of another term, to "speed his cause with effect," and not until then is he compelled to proceed, or lose the benefit of the suit. The cause being at issue, witnesses are examined, upon interrogatories prepared by counsel, the answers to which are delivered orally, and immediately reduced to writing. The depositions are afterwards made public, and copies given out to the parties interested. The cause having been heard, the court pronounces judgment, from minutes of which, taken at the time, and the senior counsel's brief, the registrar draws up the decree, prefacing it by an abstract of such parts of the pleadings as have reference to the directions of the court. Thus stood the practice previous to the late publication by the Chancellor of certain orders, founded on the propositions of the chancery commissioners. A particular discussion of each of these orders, seventy-seven in number, being incompatible with the limits of the present article, we shall briefly notice a few of the principal.

The second of them directs a subpoena to appear to be sued out against each defendant, and removes an inconvenience frequently experienced; as where one of the two first defendants could not be served before the return of the subpoena, it became necessary to sue out a second.

By the fourth, a plaintiff shall in all cases be allowed two months to deliver exceptions to the defendant's answer; but if they be not delivered within that time, the answer shall be deemed sufficient.

The eighth directs the master, upon finding an answer insufficient, to fix the time to be allowed for putting in a further answer.

The tenth revives a dormant order of 1700, by which, after a third insufficient answer, every defendant shall answer upon interrogatories to the points reported insufficient.

The thirteenth and fourteenth limit the plaintiff, in general, before replication, to one order to amend; such order to be obtained within six weeks after the answer is to be deemed

sufficient, and to contain an undertaking to amend within three weeks after the date of the order.

The fifteenth prevents a plaintiff, after replication, from withdrawing it, and amending, without a special order, obtained upon affidavit that the matter of the proposed amendment is material, and could not have been sooner introduced into the bill.

The sixteenth and seventeenth compel a plaintiff to bring his cause to issue in about one fourth of the time before allowed.

By the forty-ninth, each master is directed to enter in a book to be kept for that purpose, the name or title of every cause or matter referred to him; the date of every step taken therein; and the attendance or non-attendance of the several parties on each of such steps.

The object of the nine following, is to obtain punctuality in these attendances, and to enable the master to proceed *ex parte* where he shall think fit.

By the fifty-ninth, every warrant for attendance before the master is to be considered as peremptory, and he shall be at liberty to continue the attendance during such time as he thinks proper. The two first warrants have hitherto been considered as mere waste paper, and each attendance was limited to an hour.

The sixty-ninth empowers the master, at his discretion, to examine witnesses *vivâ voce*.

The seventy-seventh directs, that whenever, in any proceedings before the master, the same solicitor is employed for two or more parties, such master may, at his discretion, require that any of the parties shall be represented by a distinct solicitor.

The Chancellor has expressed his intention to make other alterations, for which, as affecting the fees of certain officers, he conceives the sanction of the legislature to be necessary. He will not, we trust, profit so little by the materials ready to his hand, contained in the evidence attached to the report of the commissioners, as to stop upon the threshold of improvement; he has yet done little; but that little, while it affords the best proof of his desire to assist zealously in correcting the vices of his court, contains a severe censure upon his predecessor. That Lord Lyndhurst will ever equal

Lord Eldon as an equity lawyer is not to be expected ; but he may, by a cautious exercise of his influence, achieve the prouder distinction of having purified the springs of justice, and modelled our institutions to the increased intelligence and multiplied requisitions of society. But, alterations of far greater import are imperatively demanded. The number of petitions in lunacy, set down for hearing in 1801, was 147 ; in 1823, 364 ; in bankruptcy, in 1801, 247 ; in 1823, 498. " In January 1825, the arrears of business in the three courts stood thus : 695 causes, 473 petitions, 238 causes upon exceptions and further directions, 43 pleas and demurrers, and 126 appeals, making together 1577 separate subjects for consideration ; the final settlement of which, would be sufficient to occupy the time of the three judges for at least three years to come, though no fresh business were brought before them."<sup>1</sup> From these facts, and the evidence given before the commissioners by Messrs. Heald, Bell, Roupell, Bickersteth, and the Vice Chancellor, the last of whom stated that three angels could not do the business, it is clear that three judges are insufficient to dispose of the matters brought before them, with such dispatch as the public has a right to expect. The existence of a great inconvenience being established, it remains to be enquired how it can best be remedied. The obvious methods are either to increase the number of judges, or to narrow the jurisdiction of the court—a partial adoption of each may be expected. With respect to the latter, the suggestions of the committee on the appellate jurisdiction of the House of Lords, noticed by Mr. Parkes, are peculiarly valuable. They are, that the statutory jurisdiction created by local and private acts, relating to canals, bridges, inclosures, docks, and roads, and to the supply of towns with water and gas, which direct the purchase money of lands and other property taken under authority of the same, in case of doubtful or protracted titles, to be paid into chancery ; also the administration of acts creating benefit and friendly societies, with whose disputes the court is much occupied, should be entrusted to the court of exchequer. The same remark applies to two propositions of the chancery commissioners, relative to the granting of writs of Habeas Corpus,

<sup>1</sup> Miller, 468.

and commissions to examine witnesses abroad. By several acts of parliament, the Chancellor has concurrent authority with the courts of law, to award writs of Habeas Corpus, and the practice is, although all the judges may be in town, to make applications of this nature to him. It is proposed, in order to prevent the interruption of regular business, caused by discussions on the return of these writs, that the Chancellor be empowered to grant them and make them returnable before any judge who shall proceed thereon as if they had been granted by himself. As to the other proposition; in an action at law the court cannot award a commission to examine witnesses, without the consent of the non-applying party, and if that is withheld, the other party is driven into a court of equity to obtain relief. It is recommended to invest judges at law with authority to award such commission on the request of either plaintiff or defendant, without the consent of his adversary, and that it be no longer granted by a court of equity, where the bill praying it has no other object.

But it is upon bankruptcy that the great attack must be made. That so monstrous a system should have been invented is sufficiently extraordinary — that it should have so long outlived the discovery of its unsoundness, can only be accounted for by the union of judicial and political authority, so perniciously centered in the Chancellor. Such extensive and irresponsible patronage is too valuable an appendage of that officer to be lightly surrendered; but all considerations must yield to the existing spirit of enquiry, and this tribunal, important and faulty as it is, will probably be among the first to feel its influence. The truth of the maxim, that the perfection of a tribunal is to dispense the maximum of justice with the minimum of delay and expense, is not admitted in this court. The judges of it receive 23,000*l.* a year, and the whole expense is estimated by Mr. Montagu at 240,000*l.*; each meeting of two hours costing 12*l.*, or about two shillings a minute. The practice, and sometimes the law, varies in all the lists, and the gentleman just alluded to, in one morning obtained two directly opposite decisions. These statements by no means reflect upon the commissioners, whose general zeal is testified by the facts, that in three years there were held in London 15,000 public, and 6,132 private meet-

ings ; and that of 253 petitions for hearing in chancery, in the month of July, 1826, only 27 were appeals from commissioners. To an erroneous impression on this point is attributable a proposition of the chancery commissioners, for the selection of ten of the present commissioners of bankrupts as a court of appeal, to whom all matters, now the subject of appeal to the Chancellor, should be first submitted — the original and not the appellate jurisdiction is the real burthen on the court. The creation of a single judge, ranking with the other inferior judges, is the most popular alteration that can be effected ; by him this branch of law would be administered with regularity and despatch, and at one fourth of its present cost. The objection sometimes thrown out, that such a judge would not find sufficient employment, if well founded, might be obviated by transferring to him the statutory jurisdiction before mentioned. But the plan is not the less consonant with sound policy, for including the experiment of apportioning the duties of the judge to the physical strength of the man.

Thus much for the judges of the court—its officers demand particular notice. The masters appear generally to have devoted themselves to their duties with great zeal, and a disregard of personal convenience, that in some measure atoned for their defective mode of procedure. The recent orders investing them with power to compel the regular attendance of solicitors before them, cannot fail to be beneficial, and if followed by others, establishing a uniformity of practice in all the offices, will remove the chief objections to the present system. But others are requisite. The taxation of costs should be transferred from the masters to the clerks in court, (if the existence of the latter is to continue,) they, in their capacity of assistants to the master, being really the taxing officers. The taking of accounts is another important duty of the master, for which he is peculiarly unfit. Ability to unravel mercantile accounts, intricate and artificial as is their structure, cannot be expected in a mere lawyer ; and a sufficient number of accountants would be an invaluable appendage to the office. Mr. Parkes gives a curious instance of Lord Northington's sentiments upon this point. Being pressed to refer a complicated account to the master, he

drew out his watch, and said, "Observe this curious piece of mechanism; if it was out of order, I would as soon send it to a blacksmith to be set right, as refer an account like this to a master—I refer it to two merchants." The method of remunerating the masters is injurious to themselves and the public. To themselves, as exciting suspicions of their purity—to the public, as entailing unnecessary expense on suitors in chancery. The rule of the office is, that copies of all papers left by one solicitor, must be taken by each of the others attending on the business to which such papers refer. This rule, upon a rigid observance of which a master's emoluments mainly depend, by an equitable construction is made to include another; namely, that some one must pay for a copy of every document left, whether wanted or not. Thus, in a suit for specific performance of a contract of purchase, an abstract was left by the plaintiff with the master, to whom it was referred to enquire whether a good title could be made. The defendant, knowing there was no objection to the title, did not appear before the master, but the abstract having found its way into the office, it became necessary that somebody should pay for a copy; this the plaintiff was compelled to do; but having no sort of occasion for it, he merely took away a slip of paper, endorsed "Copy abstract of title," for which he paid 8*l*. This is by no means an uncommon occurrence, these slips of paper being known by the cant term of "dead copies."

With respect to clerks in court, the chancery commissioners observe; "If we were engaged in framing a new system, it might become a matter of grave consideration, whether it would be useful to establish officers, distinct from the solicitors, for the performance of all those duties which are now performed by the clerks in court. We are satisfied, from the evidence before us, that no material delay, and a very trifling expence, arise from the intervention of clerks in court, and we believe that the existence of these officers does tend to secure a degree of regularity and uniformity of practice which, considering the great extent and variety of the business of the court of chancery, could not be obtained without them." By what process the commissioners arrived at this result, we shall not stop to enquire—our own conclusion



from the same premises is diametrically opposite ; and in support of it we refer to the evidence of Mr. Vizard, a solicitor of eminence, who states, that a step in a cause is frequently delayed a fortnight, and in one case, that an expense of 65*l.* out of a bill of 81*l.* was incurred, by the intervention of these officers. Each of them in rotation is occupied two months in the year, independent of certain meetings of the whole body, at least once or twice a week during term, for the decision of important questions, the precise nature of which Mr. Vesey when interrogated by the chancery commissioners could not recollect. On these extraordinary occasions they assemble at four, despatch their business, and dine at five : they sometimes, however, " talk of business " over their wine. Mr. Vesey acknowledges their number to be, unnecessarily large, but pleads in bar of any reduction, *the great antiquity of the number six*. The propriety of doing away with this class of officers, is often insisted upon ; but, as they are useful for keeping the records of the court, the transfer to them of the taxation of costs appears preferable to their abolition — but under any circumstances solicitors should at least have the option of conducting suits without their interference.

The number of registrars, being the same as before the office of Vice Chancellor was instituted, is found too small, and the chancery commissioners recommend the appointment of two additional ones, the whole to be selected from barristers of ten years' standing. The last part of the proposition appears objectionable. A clerk seldom becomes a registrar in less than twenty-five years, during which period he must acquire a more familiar acquaintance with this branch of practice than is to be looked for in a barrister. The registrars, like the masters, derive their profits chiefly from money paid for copies, which are taken to induce them to expedition in preparing decrees. The length of decrees so much complained of, is caused by the inability of the registrars to discharge their increasing duties ; for, driven to copy rather than abstract, these decrees necessarily contain much that is irrelevant.

There are some other points which could not have been conveniently mentioned earlier, but which we must not pass over without a brief notice.

By the act creating the office of Vice Chancellor, he is prevented from discharging or varying any order made by the Lord Chancellor, or Master of the Rolls; this extends to "orders of course;" that is, orders granted on being asked for, and drawn up and passed without being mentioned to the court. The reason of the rule, that the Vice Chancellor should not discharge or vary any order upon which another judge has exercised his judgment, fails when applied to "orders of course." It is, therefore, proposed by the chancery commissioners, with a view to correct this inconvenience, and to give more weight and efficacy to the office of Vice Chancellor, that so much of the statute as limits his power to the hearing and determining of such causes, matters, and things only as the Lord Chancellor shall direct, be repealed; and that henceforth the same independent jurisdiction be exercised by the Vice Chancellor as is now exercised by the Master of the Rolls. The extensive right of appeal, particularly in interlocutory matters, now prevailing, ought to be restricted: there is no good reason for allowing an appeal from the Vice Chancellor or Master of the Rolls, to the Chancellor, and again from him to the House of Lords.

Some limitation to the number of counsel to be employed, is desirable—two on each side appear to be sufficient. A proposition to this effect made by the chancery commissioners, if acted upon, will be much felt by young barristers; but any loss from this cause will probably be repaired by another proposition, to allow no barrister to make more than two motions at each time of being called on. The present practice permits every barrister to go through all the motions with which he is intrusted, and of course checks the distribution of business among the juniors.

That alterations of the nature we have alluded to will, ere long, be made, there appears no reason for doubting; but, whatever may be done, the foundation ought, in our opinion, to be in the separation of the office of Chancellor from that of Prolocutor of the House of Lords. While inferior judges hold their places *quamdiu bene se gesserint*, the highest officer in the realm owes his existence to the stability of a political faction: a squabble in the cabinet—a misunderstanding between two right honourable secretaries—in short, any "untoward event"

may suddenly sink him into comparative insignificance and penury. Hence he is more anxious for the preservation of his office, than for the honest discharge of its duties; and not unfrequently passes those hours which should be devoted to the judgment seat, in posting between London and Windsor. Hence too, a frequent change of judges, with its attendant evils, delay and expense to the suitor. To these necessary consequences, must be added another that may, and generally does, spring from the same pregnant source, namely, the existence of inefficient judges. "As aptitude for office," observes Mr. Parkes, "should form some consideration in promotions, it is also time that the political opinions and actions of a barrister should cease to be his chief title to the judicial office." Until they do cease so to be, a judge must necessarily be in a great measure at the mercy of counsel "and as long as the bar is more able than the bench (as of late it hath been), the business of the court can never be well dispatched."<sup>1</sup>

There is always at the bar some individual particularly calculated to succeed to the bench; and as, according to Mr. Brougham, in his late celebrated speech, Westminster Hall would unanimously select the most proper successor to Lord Tenterden; so also, we venture to assert, that no unbiassed practiser at the chancery bar would hesitate to name the individual best qualified by unprecedented extent of business, and extraordinary legal knowledge, acuteness, and energy, to discharge most efficiently the duties of Chancellor. Were decisions in chancery guided by the rules of natural equity, that is, by the vague and arbitrary dictates of individual caprice, there might be some reason for placing a common-law barrister on the bench; but, so long as the decisions of the court are founded on precedent—so long as equity forms a distinct and difficult branch of jurisprudence, such appointments must be highly reprehensible. Much stress has been laid upon what is styled the absurdity of a strict adherence to precedent in a court of equity; but "they know little that perceive not the difficulty of ordering matters in justice interlocutorily upon the strength of abstract reasoning only, without help of stated

<sup>1</sup> Proposals tendered to parliament in 1853. Parkes, 158.

rules and methods prefixed by practice and experience ;”<sup>1</sup> and, without advocating a servile dependence on previous decisions, we feel assured that there could not be a more powerful cause of evil, than the indiscriminate relaxation of general rules to meet the hardship of particular cases.

We have endeavoured to redeem our pledge by giving a plain account of the present state of the Court of Chancery. That it can longer exist thus is impossible ; but it behoves those to whom the pruning-knife may be committed to be sparing in its use.

“ The general rules of law,” observes Mr. Sugden, in his letter to Mr. Humphreys, “ are as perfect as human intelligence can make them, although there are anomalies which should be corrected, and many forms which should be abolished ; we are more enlightened, and fear not to do that directly, which our ancestors could only accomplish indirectly : and, therefore, we are all agreed that the substance should be retained, and that we arrive at it by a cheap and direct road, instead of an expensive and crooked way.”

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MERCANTILE LAW.—No. I.

MUNICIPAL jurisprudence may be classified under two general heads ; that which is purely conventional, and that which is founded on generally received principles of natural equity. Now it is evident, we think, that this latter division possesses more intrinsic interest than the other. An exquisitely artificial system, like that which regulates the course of real property in this country, has indeed charms for the antiquarian and the lawyer ; but to the general reader it necessarily presents an aspect not only unattractive, but, we fear, absolutely forbidding. We would not be understood, however, to disparage the study of this part of our law, or to deny that

<sup>1</sup> North's Examen. Parkes, 210.

occasionally it takes strong hold upon the imagination. It may be, and no doubt is, amusing enough to a man of curious and speculative turn to trace the machinery from its original structure, simple but compact, rude yet effective, down to the ingenious and elaborate apparatus, which has at length become too complicated for the management of any but the most scientific practitioner. Nor is the investigation without this further interest, that the successive additions and modifications, which the system has undergone in its progress, illustrate and are illustrated by the manners, customs, state of knowledge, and history in general, of the different periods through which it is deduced. To a mind, therefore, constituted like that of Butler, such a study is remarkably congenial, and may be supposed to convey a proportionate enjoyment. But there are not many, who have either the taste to relish such enquiries, or the industry to prosecute them with effect.

Again, we can readily conceive that it must be an intellectual exercise of a very pleasing kind, and one exactly resembling that of the geometrician or algebraist, to obtain from a few general axioms, first the leading propositions, and from these again, by regular deduction, the whole body of subordinate rules with their corollaries, which make up the law of real property; to work out the intricate problems which the occasions of a state of society like ours continually give rise to; and to apply the general *formulae* to cases and circumstances to which, at first sight, they seem but ill-adapted. It is precisely this sort of gratification, which we can suppose to have been enjoyed in an eminent degree by the subtle and ingenious Fearné. But this also, as well as the other, evidently presupposes a peculiar aptitude, either natural or acquired. In all probability the great majority even of those, who may honour us by becoming readers, are neither antiquarians, nor black-letter lawyers, nor mathematicians; are not absolutely enamoured of Lord Coke; nor would quite forget to dine, in their eagerness to settle the almost invisible boundary, which separates a conditional limitation from a contingent remainder. We may, therefore, safely revert to our original position, that the study of that branch of law, which is arbitrary in its principles,

and artificial in its structure, has no great claim to general interest.

But the case is very different with that which has its foundation in reason and equity. There is no man with a well-ordered mind, by whom the distinctions of right and wrong, even with all their niceties of shade and gradation, can be contemplated with indifference. There is no man, to whom the practical application of admitted principles in the distribution of justice, or rather in the correction of injustice, can fail to be directly interesting. Here, every decision may be referred to a standard recognized and adopted by all. Every man has in himself a test of its soundness. It is no longer authority, but reason; it is no longer mere law; it is truth, and nature, and morality. The further, therefore, we recede from regulations merely technical, the nearer we approach to the fountain head of natural justice, the more generally interesting does the inquiry become. Some mixture of positive rules there must and will be in every part of the system; but if there be any which is peculiarly exempt from artificial subtleties, and more directly referrible to equitable principles than another, it is unquestionably that which relates to commercial transactions.

Indeed, this branch of our law may be considered rather as the accessory than the principal. It merely comes in aid of what is already established. It rarely originates any thing; but simply enforces the obligations of conscience, and sanctions the regulations which, in the practice and course of trade, have been found beneficial. In its details it refers to usage, and in its precepts to common honesty. It is consequently neither abstruse in the matter, nor technical in the form. Its language is not made up of

“ Phrase which time has thrown away,  
Uncouth words in disarray,  
Trick'd in antique ruff and bonnet.”

It is the dialect in common use—the ordinary speech of men of business. It requires therefore no previous study to understand it, no painful effort to bring the mind to bear upon it.

In an age and a country like this, it is needless to insist upon

the importance of a competent acquaintance with mercantile law. What is it which has caused, in late years, so immense an addition to the judicial business of this country? What are the great majority of cases in the decision of which our courts of law are almost incessantly occupied? Are not three-fourths of them mercantile questions? Let any one consider, for a moment, the vast and complicated scheme of our foreign and domestic trade,—let him reflect upon the multitude of hands through which the several commodities pass,—on the thousand modes which are in operation, for advancing the separate interests of all concerned,—on the amazing stimulus which luxury has given to competition, and the countless schemes and speculations thence resulting;—let him endeavour to reckon up the various classes of men who derive, not subsistence only, but opulence, from trade—the hosts of manufacturers, merchants, brokers, factors, ship-owners, wharfingers, carriers, bankers, money-jobbers, and insurers—and lastly, let him contemplate the confusion introduced among all these by a bankruptcy, and he will readily conceive that the maintaining a just equilibrium, in all the parts of such a system as this, may well engross a large share of the labours both of the legislature and the bench.

Yet though so multifarious in its details, and so extensive in its application, the mercantile code of this country is by no means intricate or confused. On the contrary, it is remarkably simple and harmonious. Indeed it is a system of sudden and comparatively modern growth, having been begun, matured, and perfected within the limits of the last half century. It has therefore passed through few hands, and is the work of a succession of judges as vigorous in understanding, and of as enlightened and comprehensive views, as any that have adorned the bench,—of Mansfield, Kenyon, Ellenborough, and Tenterden. But though from this circumstance it has derived a more than ordinary unity and consistence, it has nevertheless the disadvantage, in consequence, of remaining still in a great measure an undigested heap of particulars. It is not many ages since England became decidedly a trading country. In the old text-books of the law, therefore, little is to be found on the subject of mercantile dealings. It is evidently considered a matter of minor importance; and whilst

unwearied labour is bestowed in digesting, illustrating, and commenting upon every part of the law which concerns the realty, whatever relates to the mere personalty, that unsubstantial ever-changing property, which was almost beneath the regard of the lordly proprietor of lands and manors, is either altogether passed over or dismissed with an occasional notice. Unfortunately, in modern times, the labour manifested in the compilations of Comyn, Viner and Bacon, has not been fashionable, and hence it has happened, that there is not a single treatise in which this part of our law has been reduced into one general code. Particular sections have, it is true, been handled with great ability, and some by persons now deservedly at the summit of the profession. The work of the learned Chief Justice of the King's Bench on Shipping, that of Mr. Justice Park on Insurance, and that of Mr. Justice Bayley on Bills of Exchange, are all excellent in their kind. Again there is a short Treatise on the Law of Principal and Agent by Mr. Paley, and a few others which will readily occur to the memory of the reader, well deserving the attention of the student. Still, in all these treatises there is this disadvantage, that each being the work of a separate individual, and considered only with reference to its own peculiar class of cases, there wants that unity of design, that co-relation between the different parts making up the whole, without which we conceive there can be no perfect understanding either of this or any other system. To judge of a system, as of a building, to ascertain its bearings and proportions, it must be viewed altogether, and with one sweep of the eye. The parts of which it consists, being all referrible to common principles, and directed to a common end, necessarily illustrate each other.

Granting, however, to these works, all the merit to which they are entitled, still so long a time has elapsed since their appearance, that great and important changes have taken place. The very principles on which many of the decisions were founded have been shaken—the commercial policy of ages has been overturned, and positions of law, deemed incontrovertible, may be, and indeed have been, drawn into question. Again, innumerable cases have since come under the cognizance of the courts, doubtful points have been settled, and



many distinctions and qualifications of general rules have been admitted to meet particular exigencies. It is evident, therefore, that some correction, and more addition will be needed. But, besides all this, there are several important heads of mercantile law which have never yet been the subject of any methodical treatise ; and there is a multitude of cases relating to them which are only to be found scattered through volumes of reports, or at best, collected under general titles, without order, method or connection. Now this may be a matter of little consequence to those in whom long practice supplies the place of study or research ; but it is a formidable obstacle to the progress of the novitiate. There are not many capable of either generalizing or distinguishing correctly. At all events the study becomes a work of much greater time and difficulty, than it would be if a clear and comprehensive notion were first obtained of the principles which over-ride and govern the whole. And, after all the pains which the most persevering industry can bestow, the mere case-lawyer will be liable to continual error from trusting to fancied and incorrect analogies. In short, no sound lawyer ever was or ever will be made by the mere study of particulars. The only way to know accurately, is to make sure of the principle — the only way to judge truly, is to consider the matter in question with reference to that principle, and then by way of guidance, help, or confirmation, to ascertain whether the same or a like point has before arisen, and in what way it has been determined.

To supply, as far as in our power, these several imperfections ; to connect the disjointed parts of the system, and embody all which belongs to it ; to fill up what is defective, correct what is erroneous, and fix what is floating, is the object we have now in view ; and in order to this, we propose to give in successive numbers of this magazine a series of plain, concise, and popular treatises, on the mercantile law of England. In the prosecution of this design it is our intention first to shape out a general outline of the whole system of foreign and domestic trade commencing with the simplest contract of sale, and tracing, in somewhat historical order, its gradual progression to the vast and complex operations of modern commerce. Having given this

view of the whole, in order to the better understanding of the parts, we shall then retrace the sketch, and endeavour to fill it up with greater accuracy of detail. Nor are we without a hope, that in the way proposed, the student may be led by a gradual and easy ascent to a vantage-ground, from whence the entire plan may be seen, as it were, mapped out before him. It will then be found, that the several districts into which it is parcelled out, however distinct in their boundaries, all partake of the same general properties, and are governed by the same general rules. The only difficulty then remaining will be the assigning of the particular case to its own specific class; a difficulty which will be infinitely lessened by the commanding view thus obtained. It has been urged before, and it cannot be too often repeated, that no art, no science, no system of any kind ever was or ever can be thoroughly learnt by the mere investigation of the separate parts. Who ever became, we will not say a good physician, but even a good oculist, by attending solely to the eye? Who can understand the working of a compound machine, if he confine his view to a single wheel? It is by observing the relation of the parts to each other, and to the whole, that truth is to be obtained.

Each case also must be carefully analysed, so as to elicit the principle. The same principles which regulate the simplest and most direct bargain between two individuals, will then be found to apply equally to the most intricate commercial dealing. The mind, however, is frequently puzzled by the introduction of a number of circumstances, altogether immaterial to the real question in issue; nor is there any habit more valuable, in order to correct and ready judgment, than that of separating immediately what is essential from what is merely accidental, and then confining the view solely and exclusively to the former. Thus, in a question as to the precise interpretation of the terms of a contract of sale, what matters it, for this purpose, whether the real buyer and seller dealt directly with each other, or by the intervention of a broker — whether both resided in England, or one abroad — or whether the goods were to be handed over immediately, or to be delivered through the agency of a carrier? Our notion in this respect will be

illustrated by the work itself. For the present, therefore, a single example will suffice. A mercantile house in England writes to one of the parties abroad, commissioning him to purchase and ship off a certain quantity of foreign produce to be consigned to them. He employs his broker to effect the sale, who makes a bargain, as broker, with the owner of the goods, and stipulates for the delivery of them at a particular place, on a specified day, to be thence shipped off to England. The seller gives the broker three months' credit for the price of the goods; and he draws a bill of exchange on his principal for the amount. This is accepted by him, and discounted at his bankers' abroad. The bankers again draw upon the firm in England, and they accept the bills upon the faith of the goods consigned. Now this, stripped of the machinery, is neither more nor less than a simple sale between A. and B. of goods to be delivered on a day fixed, and paid for in three months' time. It is evident, however, that out of a transaction so complicated a great variety of questions may arise. Thus, the goods may neither be of the quality, nor the quantity contracted for — they may have been damaged in the carriage either by land or water — they may have been altogether lost — the broker may have deviated from his authority in making the purchase — he may have become bankrupt before the three months were expired — the firm in England also may be insolvent, either before the goods are shipped — and they may consequently be stopped *in transitu* — or after their arrival the wharfinger may detain them for his general balance. These and many other cases may occur, and the first consideration, therefore, ought always to be, on what particular part of the transaction does the matter in dispute depend? If it be on the legal construction of the contract of sale, then every thing may be dismissed, except what relates to the mere bargain, as between A. and B. If it arise out of the relation of principal and broker, or of the partner abroad to the firm at home, then let it be viewed solely with reference to those several relations; the other particulars being taken into account only so far as they are necessary to the elucidation of that which is the real question.

All this may seem, and certainly is, very obvious; yet however true and simple in theory, there is scarcely any rule less

regarded in practice. It is the great fault of modern reports, that they set out indiscriminately all the facts of the case, without considering or caring whether they have any immediate bearing upon the point to be decided. This may be very useful for swelling the bulk of a volume, and enhancing its price ; but it is attended with a serious inconvenience to the reader. He is obliged to wade through the whole, because he is ignorant what and how much of it is material — and thus the memory is fatigued, the attention dissipated, and the mind distracted by a variety of minute circumstances, which have no more to do with the matter really in dispute than the adventures of Tom Thumb, or Jack the giant-killer. This error we shall at least endeavour to avoid in the present work. Indeed, to give a lengthened detail of particular facts, is manifestly inconsistent with its design. Where so much is to be comprehended, the limits assigned to each portion must necessarily be very narrow, and we shall therefore merely lay down general propositions, and illustrate them severally and in order, by a brief statement of the most important cases which properly belong to them. We are at the same time far from supposing that it will be possible to proceed strictly in an arrangement so purely philosophical, as that each case shall be assigned exactly to the class under which it falls. Such a method, however excellent in theory, would be found exceedingly inconvenient, if not altogether impracticable. An exception to one rule is an example of another, and it may be proper to consider it sometimes as the one, and sometimes as the other. But with this and such other qualifications as are absolutely necessary, the rule of philosophical classification will be carefully observed. If, for instance, the case be one of partnership, it will be ranged under the head of partnership, even though the subject-matter should happen to be a bill of exchange, or a charter-party of affreightment. Under the title of bill of exchange, the properties and incidents of a bill, as such, will be considered, and they only, and so with the rest. The advantages of such a method are so obvious, that on this head we shall say no more, but shall conclude these prefatory observations by reminding our readers, that if a faithful exposition of the law and principles of trade be at all times useful in a country depending in a great measure for its subsistence

on trade, it must be so in a more especial manner at a period like the present. A revolution has lately taken place both in the maxims and practice of commerce. True principles have gained ground, and a better policy is both understood and acted upon; a spirit of free, unfettered enterprise has gone abroad, and speculations are embarked in of a magnitude unknown to former times. The legislature also has recently interfered by many important enactments in the regulation of mercantile dealings, and the disposition of the property of defaulters,—and, lastly, the code of international law has in these days been settled on a solid basis by a judge, whose enlightened decisions are recognized as authority by all the civilized nations of the world. Under these circumstances, we may perhaps be pardoned for hoping that the subject proposed will be found neither unimportant nor uninteresting.

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#### ON CONVEYANCING.

##### No. I.—*Critical Remarks on some popular Writers.*

GREAT complaints have frequently been made of the repulsive aspect of our system of real property. Its general excellence, and substantial adaptation to the exigencies, and even capricious wishes of a commercial and wealthy people, are acknowledged by all who are capable of appreciating it; but its greatest admirer will also readily admit, that its stupendous bulk and bewildering complexities are well calculated to frighten away the student, or (if he must go forward) to disgust him with his profession.

Either of these consequences is, of course, to be lamented, and with the view of obviating them, elementary essays have, within a comparatively recent period, appeared on this branch of law, in great abundance. Their effect has been extremely salutary; and perhaps we may say, that if the law of real property is more regular in its form, and systematic in its doctrines than any other department of English jurisprudence, its superiority is chiefly ascribable to the meritorious efforts of those who, with the advantage of habitual acquaintance with this subject, have employed themselves in developing

its principles, and arranging its scattered topics. We shall, in the following paper, which we intend to be the commencement of a series, take a brief and rapid survey of the principal writers on the law of real property who have appeared within the last fifty years, and who are commonly taken as clues to its dark and thorny labyrinths.

Mr. Fearn, who must be placed at the head of this valuable class, symmetrized the rude and complex mass of learning on contingent and executory interests, a treatise which is interesting, not merely to the practitioner, but to the theorist, as an intellectual exercise.<sup>1</sup>

Mr. Sugden has with great ability thrown together the doctrines of the courts relative to the law of powers, and of vendors and purchasers; and if he falls far below his extraordinary predecessor in logical acumen and talent for classification, he has certainly excelled him in soundness of legal judgment and in accuracy of detail. In this respect, indeed, he cannot be praised too much. You may generally depend on the author's industry of research and fidelity of citation. He explores the fountain head of his subject; and in these laborious and useful scrutinies he has in many instances succeeded in verifying original reports. At the same time he has, we think, his faults. He appears to be not unfrequently lost in detail; and to suspend his judgment, and even waive the exercise of his reason, on the topic before him, at the appearance of contradictory authorities, which a clear perception of the principle would have enabled him to dispose of satisfactorily.

Mr. Preston, has long been treading the same path; and perhaps to the practising lawyer his numerous publications have proved as useful in some points, as those we have alluded to. They generally evince a profound and very familiar acquaintance with the law of real property in all its branches; and as a series of isolated propositions, deduced, and for the most part with skill and accuracy, from unquestioned authorities they form a valuable repertorium; but here our praise must stop. There is not one of them which does not show an incapacity for lucid arrangement, and betray a quaint and singular style in which the sense feebly glimmers through a cloud of words;<sup>2</sup>

<sup>1</sup> Of Mr. Fearn's merits we have spoken more at length, in our biographical sketch of him, page 115.

<sup>2</sup> We shall give a curious specimen of Mr. Preston's early style. "In this

we are bored with truisms in the midst of dissertations on the highest branches of the system; and, what is worse, fatigued, and indeed disgusted, with eternal repetitions. In his latter works, he has been less remarkable for his first fault; but he has made up for its absence by trebling the two last. His Essay on Abstracts, which is now in three volumes, might (we venture to affirm) be contained in one of the same size; with a little compression of the diction, and an omission of repetitions. We are almost inclined to think that the same remarks might be applied to the Treatise on Conveyancing; a work, in some particulars, deserving great commendation. The third volume, which is confined to the law of merger, though by no means free from the author's characteristic defects, has much fewer of them and is by far his most able and original production. The last edition of the Treatise on Estates, which is still in progress, demands the student's attention when he is pretty well advanced in his professional pursuits. But we cannot recommend this gentleman's editions of some standard works. Instead of increasing, he has absolutely destroyed their peculiar utility. There is scarcely a proposition in the Touchstone, which is not crippled, entangled or obscured; the original text is broken up into unintelligible bits, that the *Editor* may new-lay and commix it with his own additions. It would not be enough to say that the sense of the author is turned out of its simple course into a winding channel. The stream is perfectly dammed up. Or rather like some well-known rivers it suddenly sinks and disappears, and we see it not again till we have crossed the sterile tracts which cover it.

Mr. Preston's corrections of the text do not stop with improving its legal accuracy. Does his author purposely omit a

kingdom it is not allowed to any man to have two wives; or to any woman to have two husbands; therefore when a man is a husband to a woman, or a woman is a wife to a man, neither the relation or the rights of a husband shall, in the one case, be annexed to the person of the man, as to any other woman than his wife; nor, in the other case, shall the relation or the rights of a wife be annexed to the person of the woman, as to any other man than her husband: *of consequence* the man shall not intitle himself to be tenant by the courtesy of the lands and tenements of any other woman than his wife; for as he can be a husband to one woman only, he shall not intitle himself, with respect to any other woman than his wife, to those privileges and benefits which are proper only to the husband of the individual woman concerning whose property the question arises."—*Essay on Estates*, p. 473, 1st Edit. This is but a small portion of this truly original dissertation.

word which is necessarily understood, and would in the same place, and for the same reason, have been omitted by any body else? It is carefully inclosed in a bracket, and you are expressly told to read it. Even his author's grammar falls within the scope of his emendations. Does he meet the expression '*a use*?' He troubles himself to alter the indefinite article '*a*' into '*an*,' with (to shew that this grammatical accuracy is all his own) the '*n*' in brackets, thus, *a*[*n*].<sup>1</sup>

He has treated in the same way Mr. Watkins's *Principles of Conveyancing*, but as we think lightly of that performance, we were far less indignant at the editor's equally presumptuous and absurd plan of ramming (we must call it so) his own ideas into those of his author. We regret that candour compels us to so severe a censure; we estimate Mr. Preston's abilities, as a conveyancer, as highly as any one; and we trust that if he favours the profession again, as we understand he means to do, with other treatises, he will endeavour, more than in his previous writings, to raise his character as an author nearer to a level with his deservedly high reputation as a practical lawyer.<sup>2</sup>

After the writers we have mentioned, we would class Mr. Butler; and if the quantity and character of his legal productions were proportionate to their usefulness, we should place him above the others. There are few to whom we are more indebted. He is the first who blended practical with theoretical knowledge, and nothing can be happier than his clear and simple manner of explaining an abstruse doctrine. Hence, though his notes to the *First Institute* have rarely more connection with the text they are appended to, than with any other on the same subject, yet some of them, as insulated essays, are extremely valuable. Those on uses and trusts were, at the time they appeared, the best exposition of those doctrines; and there are several minor ones, all excellent in their way. Still there is nothing in these annotations from

<sup>1</sup> With all deference to Mr. Preston's philological knowledge, we beg to say, that here he and not his author has erred. The '*u*' is long in '*use*', and though the *h* is wanting, the word is aspirated. This is one of the instances in which orthography and orthoepy happily coincide.

<sup>2</sup> We have seen many of this gentleman's opinions, which (we speak it as a remarkable fact) have been extremely perspicuous and precise.



which a remarkable acquaintance with his subject, or a talent for combination and arrangement, or a power of pursuing principles into their remote and hidden consequences, can be inferred; and therefore neither as a writer, nor a lawyer, do they warrant us in giving Mr. Butler the highest rank. And his efforts to illustrate the First Institute appear to more peculiar disadvantage from their neighbourhood to those of his singular predecessor, who, as a lawyer, far surpassed all his contemporaries in depth of research and variety of acquirement, and who grappled always ably, and often successfully, with all the difficulties which distressed the text.<sup>1</sup>

The law of uses and trusts has been simplified and elucidated by Mr. Sanders; and considering how largely that doctrine enters into the whole system of real property, we evidently ascribe a great achievement to that gentleman, when we say that he was the first who wrote an able treatise on the subject. His work has been considerably improved in its successive editions, and is distinguished by a tolerably clear arrangement, a neat and perspicuous style, and in general by compression. He appears to us, however, to have great faults, which are scarcely balanced by the merits we have allowed him. His work is, in many parts of it, any thing but elementary. He constantly advances positions which he never thinks of supporting by any reason, or of referring to any principle; an elliptical and oracular form, which is tolerable only in writers of profound knowledge and vast powers of reasoning, who have duly weighed the inference, and carefully inspected the intermediate ideas which link it with the premises. We fear that with the majority (and among them we must place Mr. Sanders), the only pledge they can give us of having maturely reflected on their propositions, is a display of the grounds of them; we may then know what is drawn from principle, what is fixed only on authority; we may then ascertain to what point of a scale, which may be graduated from enactments and adjudications, through all the varied shades of probable deduction, down to hypothesis itself, their positions are referrible. It would not be difficult to substantiate our charge of frequent

<sup>1</sup> Of Mr. Butler's edition of Fearn, we have spoken in our biographical sketch of that gentleman.

inconsiderateness in Mr. Sanders ; and some of his errors are so palpable, that we are sure he could not have committed them, had he deemed it proper to accompany his proposition with its reason.<sup>1</sup> He is sometimes likewise woefully defective in his logic. But we can at present dwell no longer on his merits or demerits ; whatever the latter may be, his treatise does and must continue to form a part of our libraries. It has a most unquestioned claim to the student's attention ; and we hope that our endeavour to shew wherein it is really meritorious, will enable him not only to appreciate it more duly, but to profit by it more largely.

Mr. Cruise is an author of humbler pretension, but we know, in modern times, few that, on the whole, have performed a more essential service to this part of our law. We would not, however, recommend his *Digest* (with which he embodied his specific essays) as the best work to which, on every topic, the student can apply. Its merits are unequal ; and it rarely succeeds in what we have above hinted at as the peculiar merit of Fearn's Essay, which it proposes as a model ; viz. in calling the reasoning faculty into operation. Its object is to give the cases which formed the ground-work of a rule in a brief and simple way, and thereby enable us to compare the author's conclusions with his premises. But whenever he is left to his own unassisted efforts, he soon quits this laborious and useful method, and the work changes into a simple pile of abridged cases and quotations from other books. The most meritorious parts of the *Digest* are, we think, those on which the author had antecedently bestowed exclusive pains ; the chapter on uses, that on dignities, and the volume of fines and recoveries. There are others wherein he has, to a culpable extent, availed himself of the labours of others, as, for example, the chapters on remainders in the second, and those on executory devises, in the last volume, which are little better than a transcript of Fearn's Essay, with, in general, a blind adoption of that gentleman's errors. The only difference is, that he has stated the cases rather more fully. Upon the whole, therefore, we do not agree with many gentlemen who superintend the studies of the conveyancing student, that the

<sup>1</sup> *Ex uno disce.*—Vested remainders *in fee* (in fee, in italics) are grantable, (2 Uses, 29.) Who ever heard it doubted that any vested remainder might be granted ?

Digest is the best work for grounding his attainments ; with the exceptions adverted to, we advise him to use it only as a book of reference ; as which, though much inferior to Comyn, and to the abridgements,<sup>1</sup> it ranks high, and must take precedence of any modern competitor.

Of Mr. Watkins, the author of what he has been pleased to style the Principles of Conveyancing, we must now speak ; but rather out of deference to others, than because we think him entitled to be classed with those we have enlarged upon. He is, in our judgment, flippant and superficial. His work is not only crude, but little as it is, abounds with inaccuracies, the less pardonable as the author stirs not an inch from well-known ground. If he comes to what he deems a doubtful point, he dispatches it by a syllogism which always begs the question. Mr. Sanders, in replying to one of these academic puerilities, gravely tells him, on the authority of Bacon, that *sylogismus constringit assensum non animum* ; but the fallacy of the one he was addressing himself to,<sup>2</sup> was far too palpable to constrain even a momentary-assent.

The pompous proemium to Mr. Watkins's most successful work,<sup>3</sup> the Principles, in which he evinces the most exalted opinion of himself, and the most sublime contempt for Lord Coke, must excite a smile in all who compare what he has done with what he professes to do. We will give an instance. Speaking of Coke, "Points," says he, "of the greatest nicety, and learning the most abstruse, are suddenly presented to the view of a novice, which would perhaps puzzle the most experienced lawyer. Deductions and conclusions are given when the principles from whence they flowed remain unexplained," &c. Now mark how methodical is Mr. Watkins himself : how closely he adheres to his own rules of composition. He begins his chapter on possibilities thus : "A possibility cannot be on a possibility.—It is devisable," &c, Should he not, according to those rules, have first told the student what a possibility is ?

<sup>1</sup> Viner, Rolle, and Bacon.

<sup>2</sup> Relative to the doctrine of copyholds, and contained in Mr. Watkins's treatise on that subject.

<sup>3</sup> We mean as far as popularity goes. His best work (and that has really merit) is the Treatise on Copyholds.

Time would fail us were we to attempt an inquiry into the characters of all the publications of merit that have appeared within the last few years on real property ; but we should be guilty of great injustice to two very able writers, did we pass over Mr. Coote's Treatise on the Law of Mortgage, and Mr. Roberts's Treatise on Devises. . Both of them are rival works to two on the same subjects by Mr. Powel ; and though there are material points of difference between them in general structure, and design, they nevertheless admit of comparison ; and we do not hesitate to prefer those of Mr. Coote and Mr. Roberts.

These are the principal works of an elementary character with which the conveyancing student has to commence his labours ; and we think few will deny that a space still remains vacant between these large and necessarily complex treatises and the bare theoretic outline which has been sketched by the master hand of Blackstone.<sup>1</sup> At present the transition is abruptly made to one of these from the second volume of the Commentaries. Yet most of them, we will venture to say, he will not only fail to appreciate, if merely thus prepared, but will probably turn from with despair or disgust. His scientific pursuits, if he has any, will strengthen the feeling. He has been used, perhaps, to the straight and certain paths of mathematical demonstration ; to assume nothing, and to retrace, at pleasure, the long chain of beautiful dependencies which terminates in intuitive truth. He will find that he is obliged to take for granted a vast variety of *proposita* which the author has presumed his readers previously familiar with, and what is still more painful, to fix them in his memory as points of doctrine, which, however arbitrary, capricious, or revolting, are essential to a knowledge of the system he has resolved to master. Hence he soon begins to fancy that memory alone can facilitate his progress ; he accordingly endeavours (and most frequently in vain) to load it with particulars ; and though that faculty may support the grievous burthen, he is sure of failing in his great object, to become a really able lawyer, unless gifted with the

<sup>1</sup> His commentaries (says Sir William Jones in his Law of Bailments) are the most correct and beautiful outline that ever was exhibited of any human science ; but they alone will no more form a lawyer, than a general map of the world, how accurately soever it may be delineated, will make a geographer.

rare endowment of detecting and unfolding the latent principle.

We shall proceed to make a few remarks on the fitness of the student's taking up the First Institute in that stage of his studies to which we are alluding. If this work is perused under a judicious superintendant, we know none more useful; if taken as what some have styled it, the lawyer's bible,<sup>1</sup> and to be greedily and indiscriminately devoured, none probably more pernicious. We are persuaded, that in former days, when hard reading was thought, far more than now, to be essential to professional success, many a hapless tyro has thrown aside this awful volume, and his vocation likewise, from a conviction that he had encountered an insurmountable obstacle at his very outset. The truth is, that much in Littleton and Coke has now become dead matter, and may, consequently, be skipped with equal profit and pleasure. We speak of course with reference to those only who wish to accomplish themselves as lawyers, and to "attain the point proposed" by the shortest and easiest road: we by no means intend to throw disrepute on antiquarian research of any kind; but it is undoubtedly desirable that a student should know the real nature of his inquiries, and not imagine that he is advancing as a modern conveyancer, when in truth he is only qualifying as a juridical antiquary. Hence, when his wish is legal information, at present useful in conveyancing practice, we advise a selection of, and exclusive application to, those parts of the First Institute which bear on the modern doctrine of estates. There is something in the *ipsissima verba* of Littleton and Coke, which induces us to prefer them to any others on the same subject. The treatise of the former of these illustrious lawyers, leaves all similar works at an immeasurable distance, in point of lucid arrangement, and in simplicity and perspicuity of style. His divisions are always strictly logical; his classifications unexceptionable. Not a word, nay not a syllable, is used in vain. His commentator, who doubtless understood him best, begs your attention even to his great master's *et ceteras*. The merits of Coke are very different. He evidently understood arrangement extremely well though

<sup>1</sup> Dr. Watts so styles it somewhere in his Essay on the Mind.

he totally neglected it in his great work, on which he entered with a thorough knowledge of his subject, and the utmost devotion for his original author. His ideas rise spontaneously and overflow on every topic. Frequently and truly has it been said that giants were in those days. However faulty, in some respects, may be the writers who flourished between the reigns of Elizabeth and Charles the Second, however quaint and pedantic in occasional passages, we perceive in them a robustness and vigour of intellect, and a plenitude of ideas, which throw their successors far behind them in individual attainment and exertion. Our lawyers, as well as our poets and divines, will verify our remark. Indeed the very circumstance, which at this day exalts the aggregate mind of society, the increase and diffusion of knowledge, unfortunately lessens the chance of individual elevation, as nothing can be done but by concentration, and great and powerful understandings are the least likely, in an age like this, to make the sacrifice which concentration requires. Of no profession is this so true as of the law; a science, if we may *now* presume to call it so, in its nature, if not in its essence, stationary; and when it attempts to move, merely assuming some new modification, which, while it may meet the exigence which produced it, injures or perhaps destroys its symmetry and consistence by jarring with the fundamental principles which remain unchanged. Hence while its attractive power is lessened from *without*, by the resistless agency of surrounding sciences, which, from their intrinsic beauty and importance, fix our attention, and steal us from our avocations, it is sensibly diminishing from *within*, by an inherent and necessary decay; and (speaking more particularly of real property) we are doomed to see its slow but certain change from an elaborate and artificial system, to a clumsy bundle of positive enactments. If we may for a moment join two who are placed at an incalculable distance by their different subject matters, a perishable jurisprudence and the eternal principles of nature, we should say that we can no more expect another Coke than another Shakspeare. But so far they agreed, that both, with vast and vigorous minds, were wholly devoted to their own pursuits. With

the one all was law, as with the other all was poetry. Coke's felicitous exuberance on his own themes,<sup>1</sup> gives an air of meagreness and sterility to the legal compositions of Bacon himself, who reluctantly confesses the wonderful transcendency of his hated rival.<sup>2</sup> Yet partial as we are to the First Institute, and persuaded that he who wishes to become that rare unfashionable being, a deep real-property lawyer, must devote his days and nights to its pages, we would not give it to the pupil, until he has received a clearer insight into conveyancing than he can obtain from Blackstone. We therefore think that there is still a chasm; and we, it is hoped, shall not be deemed presumptuous in attempting to fill it up. For this purpose we shall give in our successive numbers, a series of papers on conveyancing, in which we shall aim, in an easy and familiar style, to develop its principles and explain its practice. Our plan will be simple and popular; we trust it will be found useful. We shall proceed at once to the system in its present modification, and shall consequently presuppose that the reader has crossed its threshold, though he may not have explored its dark and intricate interior.

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AN INQUIRY INTO THE OPERATION OF THE LATE BANKRUPT ACT, 6 G. IV. C. 16. WITH EXCLUSIVE REFERENCE TO REAL PROPERTY.

THE present bankrupt laws seem at length to have acquired some degree of stability, and their latest modification with respect to land is deserving of serious attention. We do not, however, profess to descend into all the detail which this extensive topic admits of: our proposed limits would be inconsistent with such an attempt, and the multitude of works which have lately

<sup>1</sup> To appreciate this we must read his reports.

<sup>2</sup> We allude to the admonitory letter with which Bacon insulted Coke, immediately after the latter's removal from the situation of Chief Justice. "While you speak in your element, the law, no man ordinarily equals you; but," &c.

appeared on the bankrupt laws, render it unnecessary. Our particular, if not our only endeavour, will therefore be to evince the peculiar effects of the last bankrupt act<sup>1</sup> on real property, and to correct the errors into which we presume to think some modern writers have fallen.

I.—It is laid down by a popular writer on this subject as a general rule, that all the property of the bankrupt, real and personal, in possession, remainder, or reversion, to which he was entitled at the act of bankruptcy or afterwards, is vested in the assignees by the assignment and bargain and sale; and his acts thenceforth, with reference to this property, are considered, to all intents and purposes, *as the acts of a stranger*. To which rule (he continues) some exceptions have been made by the statute;<sup>2</sup> which he accordingly proceeds to notice.

The learned author cites no authority for this position, which, however, is in conformity with the opinion which, it is believed, very generally prevails in the profession. But since the late changes in the bankrupt laws, that opinion requires consideration. It is observable, that the doctrine of *relation to the act of bankruptcy*, so as to vest the bankrupt's freehold in the assignees from that time, has been negatived by an express decision, in which, upon a question arising whether an ejectment by the assignees on a demise laid between the act of bankruptcy and the bargain and sale could be maintained, the court held that it could not, and that the freehold remained in the bankrupt, though not beneficially, until taken out of him by the conveyance.<sup>3</sup> This is an extremely important case; but from the manner in which some modern writers have expressed themselves, it seems to have escaped their notice. Mr. Preston, for instance, says that the relation of the title of the assignees is, generally speaking, to the time at which the act of bankruptcy was committed. *Therefore*, says he, if a man commit an act of bankruptcy, and afterwards marry or sell, the dower of the wife, or title of the purchaser, will be defeated.<sup>4</sup> As the judges who decided the cases subverting the premises from

<sup>1</sup> 6 G. 4. c. 16.

<sup>2</sup> Archbold's B. Law, 124. 2d edit.

<sup>3</sup> Doe v. Mitchel, 2 Maule & Sel. 446. See also T. Jon. 196. 1 Vent. 360. 12 Mod. 3. 5 Mad. 282.

<sup>4</sup> 1 Prest. Abstr. 168.



which these and other conclusions might be drawn, positively negatived the retrospective operation of that assurance as to the legal estate, it should seem to follow, that the bankrupt holds the freehold during the intermediate period as a trustee; and if equity adopted this doctrine without giving it a specific modification, and no statutory provision, either expressly or impliedly, met the case, it is evident that there would be some acts by which the bankrupt may defeat the prospective right of the assignees. For if he is a trustee, and might exercise over the legal estate the same powers which belong to any other trustee, he might at any time before the conveyance to the assignees, give a good title to a purchaser for a valuable consideration, and without notice of the act of bankruptcy, &c. When Blackstone lays it down that "all transactions of the bankrupt, with regard to the alienation of his property, are absolutely void;" he expressly grounds his proposition on the assumption that the "commission and the property of the assignees shall have a *relation or reference back* to the act of bankruptcy;"<sup>1</sup> and therefore that principle, if it ever existed, being now subverted as to the real estate, it is certain that the conveyance of the bankrupt before the conveyance to the assignees, will pass the legal, and (if equity has not made the case an anomaly) the beneficial interest also, under the circumstances above adverted to, unless, as we have already hinted, the statute law has deprived it of this power. This draws our attention to the language of the late bankrupt act with reference to the present point; for as it expressly repeals all the previous acts,<sup>2</sup> it is now unnecessary to inquire what peculiar effect any of those may be supposed to have produced. The criterion by which we must determine the validity of the bankrupt's conveyance to a *bonâ fide* purchaser without notice, when the question arises whether, not being within the special protection of a statute, it is supportable as a conveyance from a trustee under the general doctrines of the courts of equity, is the eighty-first section of the 6 G. 4. c. 16. Now that clause enacts that all conveyances, &c. by the bank-

<sup>1</sup> 2 Comm. 485., citing 4 Burr. 32.

<sup>2</sup> Mr. Sugden (*Vendors*, 667-9.) seems to be against us here; but we are at a loss to account for his opinion. In the 5 G. 4. c. 98. as well as in the last, 6 G. 4. c. 16. the repeal is *express*.

rupt, *bonâ fide* made more than two calendar months before the date and issuing of the commission against him, *shall be valid*, notwithstanding any prior act of bankruptcy, provided the purchaser had not, at the time of such conveyance, notice of such act of bankruptcy. The statute then proceeds to declare what shall henceforth constitute notice. Now the language of this statute, we must observe, is merely affirmative: it gives *validity* to any conveyance by the bankrupt when made according to its provisions; but it does not expressly *nullify* any conveyance by him which would be valid *otherwise, and without reference to any antecedent statute*. Its terms are not exclusive; and, as there can be no doubt of the intent of the legislature, the act was probably framed under an erroneous impression of the doctrine to which we have adverted. It adopts the language of Romilly's act; but that statute was correctly expressed, because its provisions have relation to the statute of Elizabeth,<sup>1</sup> which made any assurance by the bankrupt *after bankruptcy* (that is, after the *act* of bankruptcy) void, though to purchasers *bonâ fide* and without notice.<sup>2</sup> And as it was by virtue of this *positive enactment*, and not of any *principle*, that the conveyances of a bankrupt after the act of bankruptcy were nullities, it should seem to follow, that on the *repeal* of that statute, it again became necessary to annul the conveyances of the bankrupt by a legislative declaration. Still, however, as the intent of the new statute plainly appears, we may perhaps conclude that, were the point to be raised and agitated, the courts would hold, that a conveyance by a bankrupt *within* two months of the date and issuing of the commission, would be void, notwithstanding the sale were perfectly *bonâ fide*, and the purchaser had no notice. But assuming the soundness of the foregoing data, the statute, to have been accurate on this point, should not only have expressly affirmed conveyances made a given time before a certain event, viz. the issuing of the commission, but should likewise have expressly nullified all conveyances of the bankrupt, which were not in conformity with its requisitions.

II.—We shall now proceed to the *mode of conveyance* by the commissioners to the assignees. The assurance which

<sup>1</sup> 13 El. c. 7.

<sup>2</sup> See For. 66, 67.

the statute requires is "a deed indented and enrolled in any of his majesty's courts of record."<sup>1</sup> It is, we must observe, altogether *sui generis*; the execution of a statute power, equally differing from conveyances at common law, and those which are derived from the statute of uses, on the one hand, and from appointments in pursuance of powers contained in common assurances and operating by way of use, on the other. Thus neither of the former can transfer any contingent or executory interest,<sup>2</sup> but the deed of the commissioners includes not merely estates in reversion and remainder,<sup>3</sup> as well as in possession, but even possibilities.<sup>4</sup> And it is observable that the decisions have not merely established that a contingent interest in realty will pass under the deed of the commissioners, when the event only is contingent, and the person is ascertained, but likewise an interest contingent on account of the uncertainty of the person (as in the instance of a limitation to two persons for their lives, remainder to the survivor of them in fee) without respecting the analogy to the settled distinctions on this point, with reference to the descendability and devisability of contingent and executory interests.<sup>5</sup> Thus, in an early case, where an estate was devised by a father to such of his children as should be living at the death of their mother, and during the mother's life the son became a bankrupt, the court held that the son had such an interest as would pass by the assignment of the commissioners.<sup>6</sup> Still, however, the possibility of a descent, or what (in a case on another branch of law) Lord Kenyon once called the hope of a succession,<sup>7</sup> is not assignable by the commissioners.<sup>8</sup>

III.—From not understanding the precise nature of the assignment of the commissioners, and from attaching an undue importance to the title which it generally bears of a bargain and sale, some modern writers have said, that if the commissioners convey *by bargain and sale*, an enrolment within six months is

<sup>1</sup> Sec. 64.

<sup>2</sup> Fearn, 366. 1 Sand. Uses, 108.

<sup>3</sup> Mr. Deacon (Law of Bankruptcy, vol. i. 351.) says, "this seems to follow from the language of the sixty-fourth section of the new act." The language of the act is *lands, tenements and hereditaments*. Consequently reversions and vested remainders being included under both the latter words, are expressly comprised in it.

<sup>4</sup> 3 P.Wms. 132.

<sup>5</sup> Hen. Bl. 30. *ibid.* 33. 3 T. Rep. 88.

<sup>6</sup> Higden v. Williamson, 3 P.Wms. 132.

<sup>7</sup> In *Roe v. Jones*, 1 Hen. Bl. 30.

<sup>8</sup> *Moth v. Frome*, Amb. 394.

necessary, in consequence of the instrument falling within the statute of enrolments;<sup>1</sup> — an idea strangely erroneous, and arguing a singular ignorance of the principles of our law of real property! The statute of enrolments,<sup>2</sup> as these writers certainly should have known, applies only to bargains and sales which are derived from the statute of uses, and consequently only to those which are made by persons having an estate, and competent to raise a use.<sup>3</sup> Hence, as the late acts enables the commissioners to convey *estates tail* by deed indented and enrolled, without requiring the enrolment to be made within six months,<sup>4</sup> enrolment within that time is no longer necessary, and estates in fee simple and estates tail are therefore now precisely on the same footing.

IV.—Another author of a popular work on the bankrupt laws observes, that the sixty-fifth section of the late act gives only a *base fee* to the assignees, and not a fee simple, unless the bankrupt have also the ultimate remainder in fee.<sup>5</sup> How this gentleman fell into such an error we are at a loss to guess! According to this idea, the legislature has rendered a common recovery by the assignees necessary, whenever the remainder or reversion is in a third person. Now what says the act?—"The commissioners shall, by deed indented and enrolled as aforesaid, make sale, &c. of any lands, &c. whereof the bankrupt is seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, and every such deed, shall be good against the said bankrupt, and the issue of his body, and against all persons claiming under him after he became a bankrupt, and *against all persons whom the said bankrupt by fine, common recovery, or other means, might cut off or debar from any remainder, reversion, or other interest in or out of the said lands.*"<sup>6</sup> Hence it is most clear that *since* the act *as before* it, the conveyance of the commissioners produces exactly the same effect as might have been produced by the bankrupt himself before the act of bankruptcy. If, therefore, he was tenant in tail in possession, the conveyance of the commissioners has the same effect that his common recovery would have had, and consequently gives an absolute

<sup>1</sup> Eden's Bank. Laws, 225. 2 edit. Holt. 266.

<sup>2</sup> 27 H. 8. c. 16.

<sup>3</sup> See 2 Inst. 671.

<sup>4</sup> Sect. 65.

<sup>5</sup> Arch. Bank. 113.

<sup>6</sup> Sect. 65.

fee, although the remainder or reversion is in a third person, or although there are ulterior limitations by way of future use or executory devise.<sup>1</sup> By parity of reason, when the bankrupt is tenant in tail in remainder after an estate of freehold, with the remainder or reversion in another, the conveyance of the commissioners can give the assignees only a base fee, because the only assurance which the tenant in tail could have adopted for passing his estate, was a fine by proclamations which would have worked no bar to the remainder or reversion. And it is an evident corollary from the same principle, that if, in the case last put, the remainder or reversion in fee is in the bankrupt himself, the conveyance of the commissions *will* give the assignees an absolute fee, because then the tenant in tail in remainder might by a fine only have himself gained the absolute interest.<sup>2</sup> Mr. Archbold seems to have been led into different conclusions from those we have stated, and which we advance without any fear of contradiction, by the case of *Jervis et al. v. Tayleur*,<sup>3</sup> which by no means warrants his general proposition. In that case a joint commission issued against the tenant for life and the tenant in tail; and it was held that the assignees took by the bargain and sale an estate for life in the premises, and a base fee in remainder, but this upon the express and specific ground, that the conveyance of the commissioners must operate separately on each estate. The circumstance of the tenant for life and tenant in tail being *partners* seems to have been deemed quite immaterial.<sup>4</sup>

V.—It is observable that a bankrupt was always made a party to a conveyance *by the assignees*, in order to prevent the difficulty which the purchaser might otherwise be put to, in maintaining and proving the title; and he is generally made to enter into covenants for the title, in the same manner as he would have done, had he sold the estate while solvent;<sup>5</sup> but he could not have been compelled to join with the assignees in the conveyance to the purchaser, until the late act,

<sup>1</sup> 1 Mod. 108. 2 Lev. 28.

<sup>2</sup> 1 Salk. 338. 1 Show. 370. 4 Mod. 1.

<sup>3</sup> 3 Bar. & Ald. 557.

<sup>4</sup> Since the above observations were written, we have perceived that Mr. Archbold has withdrawn the proposition we have criticised from the second edition of his work.

—See p. 126.

<sup>5</sup> Sugd. Vend. 472. 7th. edit.

which enacts, that the lord chancellor on the petition of the assignees, or of any purchaser from them, of any part of the bankrupt's estate, (if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict of law establishing its validity), may order the bankrupt to join in any conveyance of such estate, or any part thereof; and if he does not execute it within the time directed by the order, he and all claiming under him are estopped, and all his estate as effectually barred by such order, as if he had executed the conveyance.<sup>1</sup>

VI.—The clause last noticed may, we think, be construed to extend to any powers which are within the scope of the bankrupt laws; and we think, therefore, that if (what can very rarely happen<sup>2</sup>) the bankrupt has a general power of appointment, without any estate in default of appointment, the assignees or the purchaser might petition the chancellor for an order to compel the bankrupt to join with the assignees in the appointment to the purchaser. For such a power is *an interest* within the meaning of the statute, and the instrument by which it is executed should seem to be a conveyance within the contemplation and policy of the clause above quoted. But it is quite clear that *no other* clause of the act can have this effect. We have made these observations in consequence of an error on this point, into which the author of a valuable treatise on the bankrupt laws has fallen, in supposing that the 77th section compels the bankrupt to execute the power in favour of his assignees.<sup>3</sup> Whereas all which that section does, is to place the assignees entirely in the place of the bankrupt, with respect to those powers which he might have exercised for his own benefit. It simply enacts, that all powers vested in the bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors in such a manner as the bankrupt might have exercised the same. Now we consider it very clear, that if the question

<sup>1</sup> Sec. 78.

<sup>2</sup> We have known this occur in practice in the usual limitations of a modern purchase deed: of course the omission was unintentional, and a clerical error.

<sup>3</sup> Holt, 281.

whether the bankrupt could be compelled to execute such power in favour of his assignees, depended on this section only, the conclusion to be drawn from it would be diametrically the reverse of that we have been commenting on, and it would be considered now, as before the act, that he could not be compelled. For surely nothing can be more evident than that the operation of this section, as far as the power is concerned, is to render any act of the bankrupt quite nugatory, by transferring that power to the assignees, and therefore there can be no object whatever in compelling the bankrupt to join in the instrument, by which it is executed, except to answer the general purposes contemplated by the following section. If therefore, *while it was unsettled*, whether the bargain and sale of the commissioners had the same operation as a due execution of the power by the bankrupt, the courts of equity held that they could not compel the bankrupt to execute the power in favour of the assignees,<sup>1</sup> and the courts of law that the appointment by the bankrupt, after the act of bankruptcy was void,<sup>2</sup> *à fortiori* would they hold so now that the bargain and sale of the commissioners has the effect given to it by the statute, of putting the assignees, with respect to the power, on the same footing exactly with the donee of it, before he became a bankrupt.

VII.—The subject of *mortgages* we shall only notice, so far as to observe, that equitable mortgages (that is, a mortgage by deposit of the title deeds) which the chancellor formerly felt great disinclination to give effect to, as against the assignees of the bankrupt, are expressly included in the 70th section of the new act, and put upon the same footing with other mortgages.

VIII.—There is one point which has not been touched on by the commentators on the new act, and which deserves our consideration. Prior to its passing, it is well known that estates which the bankrupt had as trustee,

<sup>1</sup> Thorpe v. Goodall, 17 Ves. 270.

<sup>2</sup> Doe v. Britain, 2 Barn. & Ald. 93. If these cases do not clash, the judges who decided them evidently entertained different opinions. In the latter, Bayley J., who delivered the judgment of the court, said (*ibid.* 95.) that on the act of bankruptcy the donee's "power was gone; from that period he became incapable to pass any interest whatever; all his interest having already passed to his assignees."

did not go to his assignees.<sup>1</sup> But it is now enacted, that if any bankrupt shall, as trustee, be seised of any real estate, &c., it shall be lawful for the chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, &c., on due notice given to all other persons (if any) interested therein, to order *the assignees*, and all persons whose act or consent thereto is necessary, to convey, &c., the said estate, &c., to such persons as the chancellor shall think fit, upon such trusts as the said estate was subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, &c., as the chancellor shall direct.<sup>2</sup> This section certainly seems to proceed on the assumption, that the legal estate in the bankrupt trustee is transferred to the assignees by the bargain and sale of the commissioners; for otherwise the provision is superfluous, as it is nugatory to subject the assignees to a compulsory execution of a conveyance when they have no estate to transfer. We apprehend that many modern conveyancers of respectability have ascribed this effect to the new act, and it is observable that the previous general section (the 64th) is not in *terms* confined to lands which the bankrupt was *beneficially* entitled to. At the same time it is quite certain that the legislature never intended to alter the law in this point; and none of the writers on the subject seem to have entertained the slightest suspicion of its having done so. Mr. Eden (the only one of them, we believe, that has adverted to the clause in question), remarks, and naturally enough, that "as trust estates do not pass by the assignment, the provision may appear unnecessary;" observing, however, that there have been cases (as when the bankrupt was inferred to be a trustee for his wife) in which the court has treated the assignee as a trustee, and ordered him to convey.<sup>3</sup>

<sup>1</sup> 1 T. R. 619. 19 Ves. 491. 1 P. Wms. 314.    <sup>2</sup> 6 G. 4. c. 16. s. 79.

<sup>3</sup> Eden, B. L. 244. 2nd edit., citing Bennet v. Davis, 2. P. Wms. 316. But we are inclined to regard this decision as proceeding in part on the erroneous assumption of the legal estate passing to the assignee of the bankrupt trustee in all cases: indeed if it does in one, it must in all. See the language of the Master of the Rolls, *ibid.* 319.



IX.—The most beneficial effect which this statute has produced is perhaps,

1st. The certainty which it gives to the title of the purchaser after a given period, by two sections; the former of which<sup>1</sup> enacts that that no purchase from a bankrupt, *bonâ fide* and for valuable consideration, when the purchaser *had notice*, at the time of such purchase, of the act of bankruptcy, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy. This we think a beneficial change of the pre-existing law, which, except so far as it was altered by Romilly's act, depended on the 21 Jac. 1. c. 19. s. 14. the analogous time fixed by which was five years; and even that period was no protection, if the purchaser had notice; a circumstance which frequently raised difficulties in practice. The following section<sup>2</sup> enacts that no title to property sold under the commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any claiming under him, in respect of any defect in suing out the commission, &c. unless the bankrupt shall have commenced proceedings to supersede it, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

2dly. The facility which the present statute has given to those private arrangements between an insolvent trader and his creditors, which were before so difficult, and indeed so inexpedient, deserves our applause. Before its enactment, if a trader made a conveyance of his property to trustees, though in trust for *all* his creditors,<sup>3</sup> or *part* only, if in contemplation of bankruptcy,<sup>4</sup> such conveyance was, if voluntary<sup>5</sup> and by deed,<sup>6</sup> an act of bankruptcy; and though it could be set up as such by those only who had not signed the composition deed,<sup>7</sup> it afforded an objection to the title which there were no means of removing, as it never could be proved to the satisfaction of a court, that all the creditors had concurred in the arrangement. Hence the transaction was obliged to

<sup>1</sup> Sec. 86.

<sup>2</sup> Sec. 87.

<sup>3</sup> 4 East, 230. 17 Ves. 123.

<sup>4</sup> 3 Wils. 47.

<sup>5</sup> 2 Campb. 166. 11 East, 256.

<sup>6</sup> Cowp. 633. 1 Doug. 87. 7 T. R. 71.

<sup>7</sup> 8 T. R. 140. 2 T. R. 594. n.

terminate in bankruptcy, as the only mode of completing the title. But here too arose a difficulty; for, as we have hinted, none of the creditors who had executed the deed could prosecute a commission. Whence it was the practice of some eminent conveyancers to recommend that some creditor, for the sum of 100*l.* or upwards, should withhold his consent, until the real estate was sold under the trust deed. In these composition deeds the land was often conveyed by a separate instrument, reciting an intention of converting it into personalty, and empowering the trustees to give discharges for the purchase money; thus keeping out of the title deeds all notice of the transaction which made the act of bankruptcy. The money was then assigned by the general deed for the benefit of the creditors. But the mischief was that, notwithstanding these precautions, the purchaser would still, in the nature of things, have notice of the insolvency; and, if an unwilling one, might consequently avail himself of any objection which he wished to urge against the title. These trust deeds would, however, if efficient, have been eminently useful, and it was, therefore, expedient that the rigour of the law should be relaxed in this respect. With this view it is now provided, that such a trust deed or conveyance of all a trader's property, for the benefit of *all* his creditors, shall not in future be deemed an act of bankruptcy, *unless* some creditor shall issue a commission within six calendar months from the execution of the deed, provided only that such deed shall be executed by the trustees within fifteen days of the execution thereof by the trader, and that the execution of the trader and trustees be attested by an attorney or solicitor; and that notice be given within two months after the execution in the London Gazette, and two London daily newspapers: or, in case of the trader's residence beyond forty miles from London, in the London Gazette, one London daily newspaper, and one provincial paper near his own residence.<sup>1</sup> It need hardly be observed, that the above observations are still material, inasmuch as we are thrown back on the pre-existing doctrine, when any of these requisitions to the trust deed are wanting. But we cannot forbear expressing our surprise that the present statute should have adopted the language of its predecessors

<sup>1</sup> Sec. 4.

so far as to make only a conveyance by *deed* an act of bankruptcy; for while this is the case, the policy of the law may be evaded by adopting, when the subject-matter is land, the old conveyance by feoffment, which need not be a deed.<sup>1</sup>

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ON THE DOCTRINE OF ESTOPPEL WITH REFERENCE TO THE  
TRANSFER OF CONTINGENT AND EXECUTORY INTERESTS.

SINCE the very general introduction of uses, and the consequent frequency of executory limitations, the doctrine of estoppel has acquired a far higher degree of practical importance than it formerly possessed. We propose, therefore, to discuss it with peculiar reference to those purposes to which it may be subservient in modern practice.

As estoppel has been well defined to be "when a man is concluded, by his own act or acceptance, to say the truth."<sup>2</sup> Lord Coke has divided estoppels into three kinds, viz. by matter of record, by matter in writing, and by matter in pais.<sup>3</sup> The first kind is produced by letters patents, *finés*, *recovery*, &c. The second by *deed indented*, &c. The third by *livery*, *by entry*, &c., acceptance of rent, &c. This division is equally just and important, and we shall accordingly adopt it in the present essay. The circumstances in which it is of the greatest importance to bring this doctrine into operation is, as we have hinted, when a person, who is entitled to an executory interest, which the student will remember is not a legal and conveyable estate,<sup>4</sup> is desirous of transferring it. For all that he can do, is to make a conveyance, which will bind him and all those claiming under him, or, in other

<sup>1</sup> Co. Litt. 281. And the statute of frauds, 29 Car. 2. c. 3. has only required a deed or note in writing.

<sup>2</sup> Comyn. Dig. Estoppel, A. 1. This definition is equally brief and accurate. Lord Coke's 1 Ins. 352 a. is rather wordy and pedantic. His lordship, as usual, develops the etymon of the term, and shows us that it springs from the same root as the common word, *stop*.

<sup>3</sup> Ibid.

<sup>4</sup> Vid. Fearne, 366. 1 Sand. Uses, 108.

words, which will prevent him and his heirs from asserting their legal rights when they arise. If he has an executory fee simple, it may be laid down as a general proposition, that any conveyance by matter of record, or by deed indented, will work an estoppel. The only exception to this rule (which we submit to be deducible from the authorities) is in the case of a *fine in fee*; for in consequence of the analogy which an executory right has been considered to bear<sup>1</sup> to the right of a disseisee,<sup>2</sup> it has been held that a fine in fee, by the person entitled to it, will operate to the benefit of the possession. The consequence is, that, speaking abstractedly, the only fine which in such a case can be used with safety is the fine *sur-concessit* or for years.<sup>3</sup> This point is peculiarly important when the executory interest is in tail, as then even a recovery works merely a personal estoppel,<sup>4</sup> and nothing but a fine with proclamations binds the issue in tail.<sup>5</sup> But though this is the conclusion we are led to by the express authorities on the subject with respect to the fine alone, authority and analogy equally warrant its qualification; and we may consider the common law operation of the fine in fee, controlled in this respect by an accompanying declaration of its use. For, if the tortious operation of such a fine, when by a tenant for life, may be precluded by an attendant instrument, showing that the parties meant it should operate differently,<sup>6</sup> it should seem to follow that it would not have the effect of producing an extinguishment, when in avowed pursuance of some instrument by which an intent to extinguish is negatived by a declaration of the use in favour of the grantee.<sup>7</sup> It is true that such instrument is not, strictly speaking, a declaration of uses, as the fine can of course pass no seisin to serve them; but it equally indicates the intent, which is all that appears to be re-

<sup>1</sup> Pollexfen, 66.

<sup>2</sup> Buckler's case, 2 Co. 56. 6th resolution, "that a fine by a disseisee to a stranger, merely works an extinguishment."

<sup>3</sup> Weale v. Lower, Pollexf. 54.

<sup>4</sup> Pig. 123. 10 Mod. 45. 3 Rep. 1. 1 Co. 96.

<sup>5</sup> 3 Rep. 84. Jenk. 274.

<sup>6</sup> Davis v. Bush, 1 M'Clell. & Y. 58.

<sup>7</sup> This was settled, as to powers in gross, by Earl of Jersey v. Dean, 5 B. & Ald. 569. But the express point was involved in Davis v. Bush, (sup.) though unfortunately the court there pointed principally at the tortious operation of the fine, instead of its operation by extinguishment, which was pressed by the bar.

quired by the authorities, to govern the operation of a fine or recovery. With these decisive analogies, and a judicial recognition of the doctrine we have adverted to, it is perhaps no longer necessary in practice to transfer an executory interest by a *fine sur concessit* for years. There can be no doubt that the courts would give a declaratory deed accompanying a fine in fee, the effect which the parties intended it should produce; and we may now safely regard a title as marketable which depends on that mode of assurance.<sup>1</sup>

It is, however, observable that, settled as the distinction seems to be, between these two species of fines in reference to their abstract or common law operation on a contingent or executory right, very eminent lawyers have overlooked it; and there is one case in practice in which the absence of an express recognition of it in a well-known decision,<sup>2</sup> has been the cause of no small degree of discussion and doubt.<sup>3</sup> Those who are in any way conversant with conveyancing, know, that when testators are desirous of devising their lands<sup>4</sup> in trust for sale, they most commonly give them to the trustees, and *the survivor of them, and his heirs*; a plan resulting from an excess of caution, joined to an ignorance of the manner in which the law of itself modifies a grant of lands to a plurality of persons. The intention of the testator is frustrated by the very means which he adopts to ensure the effecting of it; for instead of the inheritance passing immediately to both trustees, with a capacity of devolving on the survivor, an estate for life only is vested in them, and the survivor takes a contingent remainder in fee. Hence their inability to sell, unless this contingent fee in the survivor can be destroyed or bound. Destroyed it may be in two ways, either by a tortious conveyance (a fine, feoffment, or recovery),<sup>5</sup> from the trustees, or by merger.<sup>6</sup> The former mode is evidently out of the question; the resort to it would involve a forfeiture of the parti-

<sup>1</sup> In support of the principle we are contending for, we may further cite 2 Dyer, 157 b. Fitz. H. Estoppel, 211. 2 Rep. 69 b. Moore, 384. Ibid. 615. Skinner, 338. 1 Vent. 278. Carth. 22. 1 Vent. 368. S. C.

<sup>2</sup> Vick v. Edwards, 3 P. Wms. 372.

<sup>3</sup> Fearne, Cont. Rem. 357—9.

<sup>4</sup> When the subject-matter is *copy-hold*, this object should never be attained by a *devise* to the trustees, but by a *power*; as the latter saves the fine on admittance.

<sup>5</sup> 1 Rep. 66. Archer's case.

<sup>6</sup> Purefoy v. Rogers, 2 Saund. 386.

cular estate, and a consequent right of entry in the heir. The latter mode is unobjectionable, but of course, can be used only when the heir will join the trustees. Lord Talbot indeed has said, that his concurrence has no other effect than that of supplying the want of proving the will;<sup>1</sup> but his lordship was there clearly wrong, and his error proceeded from his assuming that the fee was in abeyance; a premise from which the conclusion we have rejected, is consistently drawn. But as no point is better settled than that, when the fee is put into contingency by a will,<sup>2</sup> or limitation of use,<sup>3</sup> it is not in abeyance, but in the grantor or heir of the devisor, it follows that when the heir joins the trustees in a conveyance to a purchaser, he passes the reversion. Hence, that estate meeting the estate for life in the same individual, they coalesce, and a merger is the result. It is, therefore, when the heir will not join, or from infancy or other disability cannot, that it is necessary to resort to the doctrine of estoppel, in order to bind the contingent fee in the survivor. In *Vick v. Edwards*, Lord Talbot said generally, that "a fine from the trustees would pass a title to a purchaser by estoppel;" and cited the case of *Weale v. Lower*.<sup>4</sup> It is evident, however, from what has been above stated, that if that learned judge laid this down in the general and unqualified way in which it appears in the report, the position is untenable, or rather extremely inaccurate. It should have been confined to a fine for years; for besides that the fine sur conuzance, *taken alone*, would be a forfeiture of the estate for life in the trustees,<sup>5</sup> it would, as we have seen, work not an *estoppel*, but an *extinguishment* of the contingent remainder. But, on the other hand, as his lordship immediately cited *Weale v. Lower*, as the authority for his proposition, it would be absurd to suppose that he intended to deny the distinction which that case established, and it is consequently to be presumed that he meant a fine for years. Granting this, Mr. Fearn's criticism on this part of the judgment in *Vick*

<sup>1</sup> In *Vick v. Edwards*, sup.

<sup>2</sup> Raym. 28. 2 Saund. 280. 1 P. Wms. 505. 2 Bro. Cas. Parl. 1.

<sup>3</sup> 2 Co. 17 b. 10 Co. 78. 85 b. Litt. Rep. 159. 253. 285. Carth. 262. Bac. Uses. 61.

<sup>4</sup> Pollexf. 54.

<sup>5</sup> 1 Rep. 66. admitted by the Court, in 1 M'Clell. & Y. 58.

v. Edwards, is ill-founded ; for such a fine is at once innocent in its operation,<sup>1</sup> and capable of binding by estoppel. With respect to the chief question in that case, whether the trustees took an immediate fee, or as they were held to take by Lord Talbot, we should wander from the subject we have proposed to treat, if we entered into it in this place: we shall, however, say that we agree with Lord Talbot's construction of the devise, and upon similar grounds to those on which it has been defended in a recent treatise.<sup>2</sup>

It does not, however, necessarily follow, that because the fee is in contingency in the devise on which we are commenting, a fine for years must be adopted in order to bind that interest by estoppel, when a sale is desirable, and the heir is not a party to the purchase deed. It is certain, that under those circumstances, a tortious conveyance in fee, whether of record, or by matter in pais, would defeat the object it was intended to accomplish, by destroying, instead of binding, the contingent remainder in the survivor ; but we have always thought, and a recent determination confirms our opinion, that a conveyance to the purchaser by an innocent assurance, (as a lease and release or bargain and sale) *effected by deed indented*, will have the desired operation as completely as a fine. And here Lord Coke's classification becomes important. The second kind of estoppel is "*by deed indented*,"<sup>3</sup> and so long as an assurance is made by an instrument clothed with this solemnity, the requisition of the law is complied with, and the grantor is estopped. For a long time a contrary opinion prevailed in the profession ; but we are persuaded of its erroneousness, and that it flowed from connecting the specific mode of assurance with the instrument by which it was made. Hence the consequent idea, that because the former was void,

<sup>1</sup> Pigot v. Salisbury, 2 Mod, 109.

<sup>2</sup> Cornish on Remainders, &c. 229. Lord Talbot's decision on this point, however, though perfectly consonant to technical rules of construction, evidently clashes with the testator's intention. Hence, when analogous cases arise, we may certainly avail ourselves of any word which furnishes a reason for not applying those rules. We remember a case in practice in which the devise was to trustees to hold to them and the survivors and survivor of them, their heirs executors, and assigns. The opinion of an eminent and experienced conveyancer was, that the trustees were joint tenants in fee. We agree with him, and on the ground we have adverted to.

<sup>3</sup> Sup. 76.

the latter was so likewise, and that a lease and release by a person not having an estate at the time of making it, was a mere nullity.<sup>1</sup> But nothing could be stranger than this idea. If the *conveyance* as *such* was *void*, how could the nature of it affect the *abstract operation of the instrument*? We were glad to find that the Vice Chancellor entertained the same opinion, and we trust that his decision,<sup>2</sup> which is demonstrably in unison with the technical distinctions of our ancient law, as well as salutary in respect to social expedience, will be considered to have settled this point. And if we are now to regard it as settled, that a lease and release may work an estoppel when the latter is by a deed indented, which it almost invariably is,<sup>3</sup> it will follow that a title from devisees in trust under the limitation in question, depending merely on that assurance, is undoubtedly marketable; the more particularly, as from the influence of Mr. Fearne's opinion, which is at direct variance with that of Lord Talbot, on the construction of the devise in *Vick v. Edwards*, many of our most eminent practitioners have been satisfied with a lease and release on the ground of the devisee's taking the immediate fee.

We shall here, however, anticipate an objection which a misconception, or rather too wide an extension, of a position in the First Institute might lead to. "Whensoever," says Lord Coke, "any interest passeth from the party, there can be no estoppel against him."<sup>4</sup> He has given several illustrations of this principle; but it is unnecessary to cite them, as a little reflection will evince that none of them are analogous to the present case. For, beyond a doubt, to the *present purpose*, the particular estate, and the contingent remainder in fee, would be regarded as distinct interests; or rather the estate for life would be deemed the only legal tangible interest, and the latter as a mere possibility. In fact, it has been settled, that it is not a possibility coupled with an interest, so as to be

<sup>1</sup> We believe this opinion to have been drawn from the principle contained in *Litt. l. 446*.

<sup>2</sup> *Bensley v. Burdon*, 2 *Sim. and Stuart*, 519. The decision, we understand, has been appealed from. *But affirmed*.

<sup>3</sup> As a release by enlargement operates on a reversion, and is consequently in the nature of a grant, it must be by deed.

<sup>4</sup> 1 *Inst.* 45 a.



devisable under the statute of wills<sup>1</sup> or descendable at the common law. It follows that with respect to the contingent fee in the survivor, the lease and release *passes no interest*, and may *therefore* bind it by estoppel.

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ON THE MODES OF PROCEEDING AGAINST TENANTS HOLDING OVER.

AN action of ejectment is, in general, the best remedy for a landlord who seeks to recover the possession of premises from a tenant holding over after the expiration of his term. Cases, however, daily happen, where recurrence cannot conveniently be had to this method of redress. For, not to mention other manifest objections, the inevitable delay which still attends an ejectment suit would often be highly prejudicial. And, again, such might be the poverty of the tenant, that the landlord could not calculate on recovering the costs which he must incur in the prosecution, even of this comparatively speedy remedy. The practitioner, therefore, is often called upon to determine whether the landlord would in such a case be subjected to any and what legal liability, by taking the law into his own hands, and expelling the wrong-doer.

Conceiving that somewhat loose, and even mistaken, notions prevail upon this subject, it is our intention to enquire in what this liability (if any) actually consists.

In the first place, we incline to think that principle and authority concur in establishing that no action could be maintained against a landlord adopting the course in question. The only forms of action which can be alleged, with any show of plausibility, to be applicable to this case, are — trespass *quare clausum fregit*; ejectment; trespass for assault and battery, in case the expulsion is effected by personal

<sup>1</sup> Doe v. Tomkinson, 2 M. & Selw. 165. And the converse of this position is established by 1 Hen. Bl. 30. Ibid. 33. 3 T. R. 88.

violence ; and trespass to personal chattels, in case the eviction of the tenant be followed up by a removal of his goods from the tenement.

In such a case, then, could the tenant maintain trespass against his lordlord for breaking and entering his close ? and more especially, supposing the entry to have been forcible and violent ? We shall abstain from citing the more ancient authorities with regard to this point ; not because they at all militate against recent decisions, but that we would avoid encumbering our argument with superfluous matter ; and that trespass is not maintainable will sufficiently appear, we think, from the following cases. The case of *Argent v. Durrant*, 8 T. R. 403. was trespass for breaking and entering the plaintiff's close and pulling down his wall. The defendant pleaded the general issue (together with a special plea not material to the present question) and gave in evidence, that the soil and freehold were his ; that he had let the premises to the plaintiff, whose term therein was expired after due notice to quit, but that the plaintiff insisting on his right to continue there, the defendant entered, &c. This was held to be a complete answer to the plaintiff's case. And, indeed, although such evidence of title was urged to be inadmissible under the general issue, yet it was not contended that, if admissible under the general issue (which however the court, upon argument, decided it to be), it did not constitute an effectual bar to the plaintiff's action. And the silence, as well of the plaintiff's counsel as of the court, upon this last head, is to be accounted for by the then recent decision in the case of *Taunton and Coslar*, 7 T. R. 431. This last case was an action of replevin for taking the plaintiff's cattle, &c. The substance of the pleadings was as follows :—The defendant (tenant) avowed under a demise from year to year, of the *locus in quo*, and that he distrained the cattle *damage feasant*. The plaintiff (landlord) pleaded in bar that he gave defendant due notice to quit, by force of which the demise to him determined ; after which he, the plaintiff, entered into the *locus in quo*, and put his cattle therein : the defendant (tenant) replied, that he ought not to be barred, &c. because he did not quit or give up the possession of the said place in which, &c. to the plaintiff (landlord), or in any manner abandon the possession of the same in pursuance of

the notice to quit, &c. To this there was a general demurrer. In support of the replication, it was urged, that if the plaintiff (landlord) could justify his act in this case, it would dispense in future with the necessity of bringing ejectment when the party is entitled to enter against another who holds the possession. But Lord Kenyon C. J., thought the case too plain for argument. He held the replication to be bad, and said, that if an action of trespass had been brought, it was clear that the landlord could have justified under a plea of *liberum tenementum*.

The case of *Turner v. Mymott*, 1 Bingham, 158. is distinguished from the preceding cases by the circumstance of force being employed in making the entry. Regular notice had here been given to quit, but the tenant did not deliver up possession; whereupon, the landlord, at a time when nobody was within (some little furniture, however, still remaining in the house), broke open the door with a crow-bar, and resumed possession. At *nisi prius*, it was held, that the law would not allow the landlord to re-instate himself in this forcible manner, and a verdict was found for the tenant. But on moving the court above, the judges were unanimous that this verdict was wrong, and a new trial was accordingly granted.

Inasmuch as, in none of the above cases, does an actual expulsion attended with bodily constraint, appear to have been alleged, it would, perhaps, be rash to assert positively that the result would not have been affected by such an allegation. But for the reasons to be presently stated, and also from the arguments of the judges in the case of *Taylor v. Cole*, 3 T. R. 292, there is little ground for supposing that it would. In the last-mentioned case an actual expulsion, under somewhat different circumstances, came in question, and the opinion of the court seemed to be, that the forcible assertion of a civil right was not the subject of a civil action.

It may be worth remarking, that before a party out of possession can support trespass *qu. cl. fr.* against another in the wrongful occupation of his close, an actual entry to revest the possession is essential, and then, but not till then, this action may be supported. Co. Lit. 57. b. and vide *Butcher v. Butcher*, 1 Manning & Ryland, 220. Now, if the tenant could maintain this action against his landlord, by reason of such an

entry, with whatever circumstances attended, this apparent absurdity would arise, that one and the same act would invest the landlord and tenant, each with a right of bringing the very same action against the other.

Few words are necessary as to the action next in order; namely, ejectment. *A fortiori*, it cannot be supported. If it can, for what term is the sheriff to be commanded by the writ of *habere facias possessionem* to cause the said John Doe to have the possession? Again: As the plaintiff must herein recover by the strength of his own title, upon what basis is that title founded as against his landlord?

We are next to examine the action of trespass for assault and battery, grounded on the application of so much violence to the person of the tenant, as is sufficient, to expel him from the premises, and no more. Now, upon the landlord's entry, the actual possession is, by operation of law, immediately taken out of the tenant and vested in the landlord. The two parties being adversely on the land together, one or the other of them must be a trespasser. And not only so, but possession being once transferred in this manner, the landlord's entry has a retrospective operation, and he is regarded, by a legal fiction, as having been in the actual enjoyment of his close, *ab initio*, i. e. from the determination of the lease; and the tenant, consequently to have been committing one continued trespass during all the intervening period. But what is the rule of law, where one man trespasses on the soil of another? Clearly this, that if the trespasser do not instantly depart, upon being requested, such a degree of force, short of wounding, may be lawfully exerted, as will suffice to remove him from the premises. Consequently, if the tenant thereupon declare in assault and battery, and the landlord justify, then, provided the justification cannot be controverted, (and it would appear that it cannot) the tenant's case must fall to the ground.

And with regard to trespass to the personal chattels of the tenant, the landlord may, in like manner, allege in justification that the plaintiff's goods and chattels were wrongfully standing in and upon the premises and incommoding him, the defendant, in the enjoyment thereof, and that he, the de-

tenant, therefore removed them, &c., doing no unnecessary damage.

Such being the tenant's prospect of redress, if he resort to an action, what will be the result of his prosecuting his landlord criminally, by an indictment of forcible entry, either under the statute of forcible entry or at common law?

Nothing can well be clearer than that a tenant at sufferance has not such an estate as is protected by any of the statutes of forcible entry. He has a bare wrongful possession, and his estate is, therefore, inferior even to a tenancy at will. Co. Lit. 576. 3 Bac. Abr. title Forcible Entry. Hawkins's P. C. c. 64. The Queen v. Griffith, 3 Sal. 169. Rex v. Bathurst, Sayer, 225. Rex v. Wannop, Sayer, 142. In this last case, the objection to the indictment was, that it did not therein appear what estate the person expelled had in the premises. And by the court, "it is absolutely necessary this *should* appear; otherwise it will be uncertain whether any one of the statutes relative to forcible entries does extend to the estate from which the expulsion was. The 5 R. 2. c. 7. the 15 R. 2. c. 2. and the 8 H. 6. c. 9. do only extend to freehold estates; and the 21 Jac. 1. c. 15. does only extend to estates holden by tenants for years, tenants by copy of court roll, tenants by elegit, statute-merchant, and statute-staple."

But, on the other hand, it seems that a tenant whose term is expired, holding over by force after demand of possession, is guilty of a forcible detainer, and liable under these same statutes. Snig v. Shirton, Cro. Jac. 199.

If the landlord, therefore, in the case we have proposed, be liable at all, it probably is only to an indictment for a forcible entry at common law. But even if this course were adopted, his liability would be by no means so clear as is commonly believed. As a general rule, it is certainly true, that the preservation of public peace being a consideration of paramount importance in the eye of the law, it will not tolerate such modes of asserting a right of property, as are calculated to produce a breach of the peace. True also, there are several dicta of Lord Kenyon and other modern judges (and the general soundness and discretion of Lord Kenyon's observations, even when extra-judicial, entitle these dicta to the highest con-

sideration), to the effect that a landlord entering with a strong hand to dispossess by force his tenant holding over unlawfully, may be indicted for a forcible entry at common law. But, on the other hand, it is material to observe, that in a case, apparently the only one wherein an indictment at common law, for a forcible entry, was ever brought directly under the consideration of that great judge, he solicitously guarded the judgment which he then delivered against any interpretation which could affect the present question. The case alluded to is that of *Rex v. Wilson*, 8 T. R. 357. a case sometimes supposed, but incorrectly so, to establish the landlord's liability. The principal count in that indictment stated, that the defendants, &c. with force of arms, *unlawfully*, injuriously, and *with a strong hand*, entered into a certain mill, &c. being in the possession of one Lewis, and him the said Lewis, from the possession of the said premises, *unlawfully*, injuriously, and *with a strong hand*, expelled and put out, &c. against the peace, &c. To this there was a demurrer, and, upon argument, judgment was given for the crown. In delivering judgment, Lord Kenyon expressed himself, generally, that, in determining that this count might be supported, effect would be given to a part of our law that ought to be preserved; namely, that no one shall, with force and violence, assert his own title. But, upon maturer consideration, he took the opportunity on a subsequent day in the term, of saying, "We wish that the grounds of our opinion may be understood. We do not in the least doubt the propriety of the decision in this case the other day, but we desire that it may not be considered as a precedent in other cases to which it does not apply. Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that, at common law, the party may enter with force into that to which he has a legal title. But *without giving any opinion concerning that dictum one way or the other*, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that *our opinion in this case leaves that question untouched*, it appearing by this indictment that the defendants *unlawfully* entered, and therefore the court cannot intend that they had any title." The passage in Hawkins here alluded to, is; "It seems that, at the common law, a man disseised of lands or tenements (if he

could not prevail by fair means) might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to enter in due time." This, however, is far from being the dictum of Hawkins alone: much older authorities support the same doctrine.—In Lamb, Justice of the Peace, tit. Forcible Entry, the position is laid down in almost the same terms, and the year books cited as authorities. Bracton has an elaborate chapter, "*De primo remedio post disseisinam*," fol. 162 b. to ascertain within what time a party disseised may reinstate himself by force. Dalt. c. 76. and Cromp. 70 a, b. take the same view of this question, and so do Reeves, vol. ii. 202. and Blackstone, vol. iv. 148. whose opinions are not altogether destitute of weight on a point of this nature.

It may also be urged, that there is a strong though silent stream of precedent in favour of this position, no indictment at common law appearing to have been ever instituted (at least with success) in the case we are considering: and, moreover, that it receives some countenance from the statute 5 R. 2. which otherwise would have been altogether idle and inoperative. Much stress, however, is not to be laid on these last circumstances; but it is unquestionably very difficult to reconcile the modern dicta we have mentioned, with this very general consent of ancient writers, the other way. There is no denying that the early text-writers must have been better acquainted than we can possibly pretend to be, with the law as it stood in the days in which they flourished; that what was law at any former period of our history, must be law still, unless statutable enactments or adverse decisions have intervened; that no such statutable enactments or adverse judicial decisions *have* intervened; and that, therefore, a court of justice would find some difficulty in deciding an indictment to be maintainable at common law upon an entry pursued with no more force than sufficient to re-establish a party having title to enter, in his rightful possession of the premises. But, on the other hand, the numerous recent dicta that are opposed to this conclusion, the altered constitution of society, the distinction that may be taken between the case of a disseisin (to which alone the ancient dicta may be contended to have been directed) and that of

a wrongful holding over upon an entry originally lawful, and, above all, the existence of the general principle mentioned in the outset, that private rights are not to be asserted at the hazard of endangering public peace, together with the temper of the courts to give effect in every conjuncture to a rule so conducive to tranquillity, all these circumstances in co-operation, render it not improbable that such an indictment would in the present day, be held sustainable.

When we recollect, however, that a tenant so dispossessed, could obtain, by indicting his landlord, no restitution of possession, and must be put to considerable expense, without any equivalent or compensation ; and also, that the punishment inflicted upon the landlord (supposing the indictment to lie) would probably, unless in an outrageous case, be merely nominal ; this part of the question will not appear very likely to be soon decided.

In conclusion, it may be useful to remark, that, if the landlord can obtain possession without violence, during the absence though only temporary of the tenant and his family, there would seem to be no pretence for calling the entry a forcible one. With respect to what will constitute a forcible entry, there must exist a close analogy between forcible entries under the statutes and forcible entries at common law ; and it has been held, with regard to the former, that if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force—these will not be forcible entries. But for the various shades by which cases of this sort may be distinguished, we must refer our readers to the express treatises on the subject, in Burn's J. P., Hawkins's P. C., Comyn's Dig., and Bacon's Abr.



**ON THE CUSTOM OF MAKING ALLOWANCES OUT OF THE POOR-RATE TO ABLE-BODIED LABOURERS IN INCREASE OF THEIR WAGES.**

**THERE** are now depending in parliament several bills for the amendment and alteration of the poor laws. It is not our intention at present to give any detail of their various provisions, or of the different plans of improvement suggested by different members of the legislature. But there is one part of these laws to which we are anxious that the public attention should be more generally directed. It is well known that a system has grown up, in several of the southern counties, of paying a certain portion of the wages of agricultural labourers out of the poor rates. There are, it seems, about sixteen counties over which this practice has spread, and in these it is completely established. The quantum to be paid to each labourer by the parish is settled and well known both by the parish officer and the pauper, and in most parishes it is contingent on the number of children which the pauper has. The tendency of this abuse of the poor law is self-evident : in fact, those counties in which the abuse exists are separable from others in which it does not exist, by a line, on one side of which are high wages and low rates, on the other low wages and high rates.<sup>1</sup>

This important branch of the poor law system was brought under the notice of the House of Commons by Mr. Slaney, on the 17th of April last. On that day he moved for leave to bring in a bill to declare and amend the existing law relating to able-bodied paupers. His motion embraced other objects connected with the administration of the poor laws ; but to those it is not our intention at present to advert. The one which we have mentioned above is the subject of the following remarks. We shall limit ourselves even more closely ; for it is to one part only of that subject, to which we mean to confine ourselves. Remarkable as is that state of things to which we have just alluded, and important as

<sup>1</sup> Mr. Slaney's speech in the House of Commons, 17th of April.

its consequences must be to the morals and independence of the poor, it forms no part of our present plan, either to examine the causes whence the system originated, or to trace out the consequences that may ultimately flow from it. It is sufficient for us to enquire into the legality of the practice such as we find it : we leave it to the legislature to decide on its expediency.

The question which we propose to discuss is the following : Whether able-bodied persons in full work, but at wages insufficient for the maintenance of themselves and their families, are entitled to parochial relief.

Most of our readers will be aware that this question, or one precisely similar to it, came before the court of king's bench in *Rex v. Collett*, 2 Barn. & Cres. 324. The only difference was, that in the case just cited, pecuniary relief had been given to able-bodied workmen out of employment ; in the case under discussion, relief is given to paupers in full work. The court of king's bench gave no opinion on the case submitted to them, but said that, before they determined whether the overseers were or were not justified in giving pecuniary relief to the unemployed poor, the case must go down to the sessions again, that the court might be informed whether any, and if any, what endeavours had been made to procure employment for them.

The question which we are now considering cannot be got rid of like the question in *Rex v. Collett*. The parish officers cannot be called upon to set to work paupers who are already fully employed. So that the simple question remains, whether the parish officers are authorized by the statute 43 Eliz. c. 2., or otherwise, to relieve paupers circumstanced as above described. We are of opinion that they are not ; and for the following reasons :

Many provisions for the relief of the poor were made by the legislature before the passing of the 43 Eliz. c. 2. All of them are confined to the same objects ; the relief of "impotent, &c. persons, being not able to work," and the punishment of sturdy beggars and others who refuse to work. The first legislative enactment for setting to work the able-bodied poor, is contained in the 14 Eliz. c. 5. s. 23. It provides that "three justices of the peace, whereof one shall be of the quorum,

with the surplusages of the said collections, &c. (the said poor and impotent people satisfied and provided for), shall by their discretions, in such convenient place and places within their shires as they shall think meet, place and settle to work the rogues and vagabonds that shall be disposed to work, born within their said counties, or there abiding for the most part within the said three years, there to be holden to work by the oversight of the said overseers to get their livings, and be sustained only upon their labour and travail."

Next to this statute follows that of the 18 Eliz. c. 3., made to amend the former act. This statute makes further provision for setting to work such poor and needy persons as were able to do work, but stood in need of relief. The law remained in this state till the passing of 39 & 40 Eliz. c. 3. That act made further provision for the relief of the impotent, and the employment of the able-bodied poor. The 43 Eliz. c. 2. embodied all the provisions in the former acts, which the experience of their operation suggested as expedient. By that statute it is enacted, that the churchwardens and overseers of the poor, or the greater part of them, should take order from time to time, with the consent of two or more justices of the peace, for setting to work the children of all such whose parents should not by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children, and also for setting to work all such persons married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by: and also to raise weekly or otherwise by taxation of every inhabitant, &c. a convenient stock of flax, hemp, wool, thread, iron and other necessary ware, and stuff to set the poor on work, and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for the putting out of such children to be apprentices." There seems to be nothing in any of the enactments of this statute, or of those which preceded it, that can be so construed as to empower the overseers to give relief to able-bodied persons in any other manner than by setting them to work. In *Rex v. Collett*, the overseers had given pecuniary relief to able-bodied persons who were out of employment,

and it was argued in support of what they had done, that labourers out of employment, and who were unable to procure employment, came within the description of "impotent persons" whom the 43 Eliz. c. 2. directs the overseers to relieve. An *obiter dictum* of Eyre J. in *Waltham v. Sparkes*, Skin. 556. Comb. 320. was cited in favour of this interpretation of the word "impotent," but it is an interpretation which can scarcely be forced upon that word, and which is inconsistent with the meaning that has been put upon that word in several decided cases.<sup>1</sup> But, be this as it may, it would be a clear misapplication of terms to describe as "impotent" able-bodied labourers in full work. It was contended by counsel, in the argument in *Rex v. Collet*, that the preamble to the 8th & 9th Will. III. c. 30. shewed that labourers out of employment were then considered by the legislature entitled to parochial relief on that ground. The preamble alluded to begins as follows: Forasmuch, as many poor persons chargeable to the parish, township, or place where they live, merely for want of work, would in any other place where sufficient employment is to be had maintain themselves and families." The answer to the inference drawn from this preamble is obvious, and was given to it when that argument was used. It was not denied that persons might become chargeable "merely for want of work," but it was said that such relief only should be given as was pointed out by the 43 Eliz. c. 2.: that such persons were to be relieved by having work found for them, and in no other manner; that the legislature never contemplated any different mode of relief, whether the labour should be profitable or not: that the second section of that act was a clear legislative recognition of this principle; for in that section, it was expressly stated, that the enactment therein contained, was made "to the end that the money raised only for the relief of such as were as well impotent as poor might not be

<sup>1</sup> See *Rex v. Gully*, 1 Bott. 366. *Rex v. Litton*, ib. Anon. 5 Mod. 397. *Kilbeck's case*, 2 Keb. 37. pl. 79. It may also be remarked, that the 13 & 14 Car. II. c. 12. s. 3. speaking of labourers going out of their own parish to work in harvest, says, "if such persons shall not return when their work is finished, or shall fall sick or impotent whilst they are in the said work, it shall not be accounted a settlement." From the manner in which the word "impotent" is used in this statute, the legislature appears to have considered it is assynonymous with "unable to work," not "unable to procure work."

misapplied and consumed by the idle, sturdy, and disorderly beggars." We believe this to be a sufficient and satisfactory answer to any inference drawn from the preamble of the 8th & 9th Will. III. c. 30.

By the 43 Eliz. c. 2. competent sums of money are to be raised "for the necessary relief of the lame, impotent, old, blind, and such other among them *being poor and not able to work.*" We are at a loss to conceive how the description here given of the persons who are to receive pecuniary relief, can be applicable to able-bodied labourers in full work. Yet those who contend for the legality of the payments which are every day made out of the poor rates to such persons, must go this length; unless indeed the authority of the overseers to give relief in such cases, is derived from some subsequent statute. For in the 43 Eliz. c. 2., there is no other description given of the persons who are to receive pecuniary relief: there is no description given of the persons entitled to any other kind of parochial relief than merely the receiving employment which can be made to comprehend within it the class of persons we are now speaking of. Indeed the legislature of that period shews distinctly that it was not their intention that able-bodied labourers should, under any circumstances, receive pecuniary assistance. For the statute 43 Eliz. c. 2. s. 1. mentions both the unemployed and employed labouring poor; and it points out the manner in which the overseers are to act towards each. It directs that the unemployed are to be set to work. It also expressly mentions the class of persons now under consideration; viz. the employed poor, who are unable to keep and maintain their families, and it points out the manner in which the parish officers shall act towards them. It directs that the overseers shall take order, from time to time, for setting to work their children; but it gives no power of granting them relief in any other manner. The omission of all mention of pecuniary relief, shews that was not the intention of the legislature of the 43 Eliz. that pecuniary relief should under such circumstances be given.

Assuming then that the statute 43 Eliz. c. 2. does not authorize the overseers to give relief to the able-bodied poor when in full work, it remains to be considered, whether by any subsequent statute such authority is given them.

The 36 Geo. III. c. 23. is sometimes quoted as having this effect. Let us examine the object which that statute had in view. The statute 9 Geo. I. c. 7. s. 4. enacted, that if any poor person should refuse to be lodged in the poor-house, he should not be entitled to receive collection or relief from the churchwardens and overseers of the poor. The 36 Geo. III. c. 23. after reciting that the above provision had been found to be inconvenient and oppressive, inasmuch as it often prevented an industrious poor person from receiving such occasional relief as was best suited to his peculiar case, goes on to enact, that "it should be lawful for the overseer of any parish, with the approbation of the parishioners, or the majority of them, in vestry assembled, or with the approbation in writing of any of his Majesty's justice or justices of the peace, usually acting in and for the respective district, to distribute and pay collection and relief to any industrious poor person at his own house, under certain circumstances of temporary illness or distress, and in certain cases respecting such poor person or his family; or respecting the situation, health, or condition of the poor house, although such poor person should refuse to be lodged within the poor-house, any thing in the said act 9 Geo. I. to the contrary notwithstanding. By sec. 2. it is enacted that any justice of the county, &c. may, at his discretion, direct and order collection and relief to any industrious poor person, and he shall be entitled to ask and receive such relief at his own home, notwithstanding a contract shall have been made for lodging and employing all the poor of the parish in the poor-house.—Sec. 3. Provided always that the special cause, *as hereinbefore mentioned*, of ordering and directing collection or relief to any poor person at his own home, be assigned and written on each order for relief, given and directed by any justice as aforesaid." Taking the whole of this enactment together, it is plain that it was not the intention of the legislature to give a claim for relief to any class of persons not before entitled to it; but to regulate the manner in which the relief should be given. It cannot escape the observation of any one, that the words "under certain circumstances of temporary illness or distress," &c. govern the whole that follows them. When the 2nd section enacts that a justice may order relief to any industrious poor person, at

his own home, its enactment is controlled by the proviso of the third section, that the "special cause, *as hereinbefore mentioned*," of ordering relief, be assigned on each order. The "special cause as hereinbefore mentioned" can have reference to nothing, but to the "certain circumstances of temporary illness," &c. Those circumstances of temporary illness, &c. are the only causes of granting relief, which have been mentioned in the preceding part of the statute. If the above be the proper construction of the statute, and it is incapable of any other, the legality of giving relief out of the poor-rate to able-bodied labourers is unaffected by its enactments, and the practice is therefore legal or otherwise, according as it is or is not sanctioned by the 43 Eliz. c. 2.

The force of this argument will appear more strongly, if the object be kept in view for which the 36 Geo. III. c. 23. was passed. It has already been stated, that the 9 Geo. I. deprived the poor of all right to parish relief, unless they consented to be lodged in the poor-house. The 36 Geo. III. c. 23. was intended so far to diminish the rigour of the 9 Geo. I. as to obviate the necessity of sending the distressed to the poor-house, under all circumstances; and for that purpose it was enacted that they might, "under certain circumstances," be relieved at their own homes. It was not the intention of this enactment to add a new class of persons to those already entitled to relief; but to provide that those, who were already entitled thereto by the 43 Eliz. might, under certain circumstances, be relieved without being compelled to go into the poor-house.

The next statute, bearing upon this subject, is the 55 Geo. III. c. 137. The third section of this act extends the time during which relief might be given under the provisions of 36 Geo. III. c. 23. The orders of relief to poor persons at their own homes, given under the last mentioned statute by one or more justices, were to continue in force for one month only; and they could only be continued from month to month, by an order of two justices. The 55 Geo. III. c. 137. s. 3. after reciting the powers given to justices by the 36 Geo. III., and that it was expedient, that justices should be empowered to order relief to be paid to poor persons, *in the cases mentioned in the said act*, for longer periods than one month at a time,

enacts "that it should be lawful for any justice or justices of the peace, *in the cases and in the manner mentioned in the said act*, to direct and order relief to be paid to any poor person at his own home, for any period not exceeding three months, and that two justices might make a further order for the like purpose, for any period not exceeding six months. Our only object in citing this statute, has been to make it clear that, although it extends the time for which a justice may order relief to be given to the poor at their own homes, it does not make any difference as to the class of persons to whom relief is to be given, or in the circumstances in which it is to be given. We are not aware of any subsequent statute which affects this question, unless it be 59 Geo. III. c. 12. s. 5. and that section merely enacts, that every order of relief, in parishes not having a select vestry, shall be made by two or more justices; that every such order shall specify the special cause of granting relief, and that no such order shall be in force for any longer time than one month, from the date thereof.

If the preceding remarks be correct, the parish officers are not authorised by the 43 Eliz. c. 2. to give relief, out of the poor rate, to all able-bodied paupers in full work. We have also shewn that the 36 Geo. III. c. 23., the only statute which is even asserted to have extended the power of the overseers in this respect, does not empower them to give relief to the poor at their own homes, except "under certain circumstances of temporary illness or distress, and in certain cases respecting a poor person or his family, or respecting the condition, &c. of the poor-house." We presume, therefore, that we have fairly established that the practice, which we have been alluding to, is illegal, unless its supporters can shew that *able-bodied labourers in full work*, are to be considered "under certain circumstances of temporary illness or distress," or that their case is one of those "certain cases, respecting such poor person or his family, or respecting the condition of the workhouse," in which, only, it was the intention of the legislature that relief should be given to the poor at their own homes. There is no pretence for saying that poor persons, circumstanced like those whom we are now speaking of, are "under circumstances of temporary illness, or dis-



dress." And we trust we have already shewn that by the "certain cases respecting poor persons or ather families, or respecting the condition of the workhouse," the legislature of the 36 Geo. III. meant certain of those cases, only, where the poor persons or his family were, by the laws then in force, entitled to relief.

On a careful review of the whole case, we have come to the conclusion that the practice of paying a part of the wages of able-bodied labourers out of the poor rate is a misapplication of that fund. We are also of opinion that, independent of its being a misapplication of the poor rate, it perverts the whole system of the poor laws, by introducing a species of relief, which it was not the intention of the legislature, either in the time of Elizabeth, or in any subsequent reign, to introduce. The object of the poor laws is, that the impotent poor should be relieved, and that the able-bodied should be set to work. But as to eking out the wages of able-bodied labourers, when ever those wages are too low, that is a practice which these laws no where recognize, and which they certainly do not sanction. "According to the poor laws, he who is able to labour is to be maintained by labour only, and nothing is to be provided for him but a means of employment."<sup>1</sup>

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ON THE EFFECT OF AN ASSIGNMENT BY THE HUSBAND, FOR A VALUABLE CONSIDERATION, OF HIS WIFE'S LEGAL CHOSES IN ACTION, AS AGAINST HER SURVIVING.

THE degrees by which our law of property has been elaborated from a few simple maxims, into the vast and complicated system we have now to deal with, could not perhaps be better illustrated than by a review of the cases which, from time to time, have come under the consideration of the courts of law and equity, relative to the mutual rights of the parties to the marriage contract. But, however, interesting such an investigation might be to the juridical philosopher, a subject of in-

<sup>1</sup> Per Best J. in *Rex v. the Justices of the N. R. of Yorkshire*. 2 Barn. & Cress. 292.

quiry more immediately useful presents itself to our notice. The transactions hourly arising out of the relation of husband and wife are so numerous and complex, that the existence of a doubt on the legal effect of any of them, is a great practical evil ; in removing which we shall endeavour to assist, by extracting the principles of the cases relating to the point we have selected for discussion.

The courts of equity, in dealing with such property of a married woman as comes under the denomination of a "chose in action," have ever professed to observe in their decisions an analogy to the rule of law which leaves to a wife surviving her husband, the full benefit of that property, unless it shall have been "reduced into possession" by the husband during the coverture.<sup>1</sup> They have at the same time, in recognizing and enforcing assignments of choses in action (if made for valuable consideration), proceeded directly in opposition to another legal principle ; which, with a view of preventing litigation, forbids the transfer of interests of that nature.<sup>2</sup> Hence the effect of an assignment of a married woman's choses in action has been frequently, during a long series of years, a subject of doubt and discussion in the courts of equity. Parties interested under assignments of various descriptions, have struggled, by means of the jurisdiction of those courts, to establish their claims to personal property of this nature belonging to married women, in opposition to the legal right by survivorship of the latter. Availing themselves of the determination of the courts of equity to support assignments of choses in action, those parties have pressed them to proceed from the open infringement of one legal principle, to the virtual abolition of another ; by putting such an "equitable" construction upon that requisition of the law by which the wife's choses in action must be "reduced into possession," as would bring *assignments* of them within the terms of the rule. Amidst the multitude of decisions upon this subject, some of which overturn the preceding, and many of which appear to have been decided upon irreconcilable principles, it is satisfactory to observe that the courts of equity have in later times become more and more anxious to preserve from innovation

<sup>1</sup> Co. Lit. 351 a.

<sup>2</sup> Ibid. 214. a. Ibid. 232. b. Butl. No. 1.

the ancient legal rule in favour of the wife ; and to restore it, where it had been violated, to its primitive integrity.

One question with reference to it, appears to some to be still open to discussion ; namely, *the effect of an assignment by the husband for valuable consideration of his wife's legal choses in action, as against the wife surviving.*

We propose, therefore, succinctly to consider, with reference to the terms of the rule, and the principal decisions bearing upon this question, what ground there is for supposing such an assignment to be good in equity, as against the wife surviving, in the event of the husband's dying before the assignee shall have gained possession of the property. In order to simplify the inquiry, it will be proper to exclude from it any notice of the effect of a settlement before marriage, by the husband upon his wife, in rendering him (in equity) a *purchaser* of her choses in action ; and also to avoid touching upon that (until lately) much contested ground, the effect of an assignment of the wife's *reversionary or contingent* choses in action.

The doctrine of the law is thus laid down by Lord Coke.—“ Marriage is an absolute gift of all chattels personal in possession in the wife's own right, whether the husband survives the wife or no ; but *if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them.*”<sup>1</sup> It is thus expressed by a modern writer on the law of husband and wife. “ Marriage is only a qualified gift to the husband of the wife's choses in action, viz. upon condition that he reduce them into possession during its continuance ; for, if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it.”<sup>2</sup> The first of these propositions sufficiently denotes what description of property is the subject of our present consideration ; and the terms employed in both in stating the requisition of the law respecting it, are so plain as to seem to require no explanation. Some legal writers, however, have thought it necessary to tell us “ what is a reduction into possession ;” and, classing with the actual receipt of the property, certain other

<sup>1</sup> Co. Lit. 351 a.

<sup>2</sup> 1 Roper's Law of Husband and Wife, 204. 2d edit.

acts and proceedings, not attended with the occupation of it, have assumed in the outset, that the law has employed the terms "reduction into possession," in a technical sense, contradictory to their primitive signification. If there were any established modes by which property of the wife remaining "in action," at the time of the husband's decease (unaffected by the operation of a settlement before marriage) could be vested in his representatives, to the exclusion of the wife, the simplest course would be, after laying down the rule, to state these modes of acquisition as *exceptions* to it. But to state, as instances of reduction into possession, acts unattended by occupation of the property, is most unnecessarily to bring upon the phraseology of the law the highest reproach which can be cast upon language employed to express "rules of civil conduct" for the governance of the community, namely, that of being an arbitrary jargon in which the terms employed sometimes signify the reverse of what they convey to the understandings of the community. Thus a learned writer<sup>1</sup> has laid it down that "the acts to effect the purpose of reducing the wife's choses in action into possession must be such as to change the property in them, or in other words, must be something to divest the wife's right, and to make that of the husband absolute; such as *a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied to his use.*" There appears to be here an inaccuracy of classification which may lead to confusion of ideas, and to conclusions not merely erroneous, but prejudicial to the rights of innocent parties. A chose in action is defined to be property recoverable by suit or action at law.<sup>2</sup> Now the effect of a judgment or decree is to change the nature of the subject matter. The property ceases to be a thing for the recovery of which an action or suit must be brought, and is thereby, and not by any conceivable effect upon the possession, taken out of the application of the rule which gives to the wife surviving, such property originally her's as remains "in action" at the time of her husband's decease. As on the contrary, in the case of an assignment of a chose in action, that

<sup>1</sup> 1 Roper, Husband and Wife, 208.

<sup>2</sup> See 2 Blac. Com. 396.

is, of the husband's right to reduce the thing into possession, there is (as the very terms imply) the same necessity on the part of the assignée, as on that of the assignor, of bringing an action for the recovery of the possession, we cannot, without absurdity, attempt (as has been sometimes done) to reason from the effect of a judgment, or decree, to that of a transfer of the right of action.

That an intention on the part of the husband to reduce the "chose" into possession,<sup>1</sup> or his actually deriving a pecuniary advantage from it, short of the actual reduction of the whole, (as by receipt of part, and of interest on the residue) will not bar the wife's claim, is settled.<sup>2</sup> If, therefore, the assignment of the wife's chose in action for valuable consideration defeats the wife's title by survivorship, it must be upon grounds peculiar to itself.

It was formerly contended, and several times decided, that even an involuntary assignment, (as in case of bankruptcy) defeated the right of the wife. Thus in *Bosvil v. Brander*,<sup>3</sup> (in 1718) where a feme mortgagee in fee married a person who became a bankrupt, and died, the widow brought her bill against the assignees for recovery of the title deeds. Sir Joseph Jekyll, after deciding first in favor of the widow, ultimately dismissed her bill. He grounded his judgment upon a distinction now clearly untenable, and at the same time admitted a principle which seems irreconcilable with his decision. "It might" he said, "have been a matter of different consideration, if the assignees had been *plaintiffs* in equity, and desired the aid thereof to strip an unfortunate widow of all that she had in the world; towards the doing of which equity would hardly have lent any assistance, *because the assignees claiming under the bankrupt husband could be in no better plight than the husband could have been.*" Even so late as *Pringle v. Hodgson*,<sup>4</sup> it was held by Lord Rosslyn, that, "the question of survivorship was quite laid aside by the bankruptcy." On the other hand, Lord Hardwicke in *Grey v. Kentish*,<sup>5</sup> and Lord Bathurst in *Gayer v. Wilkinson*,<sup>6</sup> decided in favor of the wife against the assignees. At length it was solemnly decided by

<sup>1</sup> *Blount v. Bestland*, 6 Ves. 515.

<sup>2</sup> *Nash v. Nash*, 2 Madd. 133.

<sup>3</sup> 1 P. Wms. 458.

<sup>4</sup> 3 Ves. 617.

<sup>5</sup> 1 Atk. 280. 8. C. 1 P. W. 459. n.

<sup>6</sup> 1 Bro. C. C. 60. n. 2 Dick. 492.

Sir William Grant in *Mitford v. Mitford*,<sup>1</sup> that an assignment in bankruptcy does not bar the legal right of the wife surviving; upon the principle, that "the assignment from the commissioners, like any other assignment by operation of law, passes the bankrupt's rights precisely in the same plight and condition as he possessed them." The principles laid down by Sir William Grant in his elaborate judgment, are very important with reference to the present question. "With respect to choses in action," he said, "they are not assignable at law, consequently the husband's assignment of them cannot prevent their legally surviving to the wife. In strict analogy, therefore, *equitable interests of the nature of choses in action* ought not to be affected by his assignment. But in equity a distinction seems to have been made between a voluntary assignment, and an assignment for valuable consideration. The wife surviving is not bound by his voluntary assignment. That was determined in *Burnet v. Kinaston*,<sup>2</sup> which case has been ever since adhered to, and acted upon." The "equitable interests" here mentioned as being assignable for valuable consideration, we may conclude to be, funds in court, or in the hands of trustees, legacies, residuary estate, and the like. Even with respect to these equitable choses in action, as they are called, Sir Thomas Plumer seems to have considered the decisions of the courts of equity somewhat anomalous in establishing assignments of them against the wife surviving. In *Johnson v. Johnson*,<sup>3</sup> speaking of a fund in court belonging to a married woman who had survived her husband, he said: "If it were now a new point, it would be difficult to understand how the assignee could be in a better situation than the husband himself; for the assignment does not reduce it into possession, it still remains a chose in action, and its being a chose in action gives the wife a right by survivorship. But it is too late to consider this; for it is decided that an assignment for valuable consideration being a disposition of the property, is sufficient to bar the right of the wife surviving.<sup>4</sup> It does not, however, take away her equity."<sup>5</sup> It is

<sup>1</sup> 9 Ves. 87., and see *Car v. Taylor*, 10 Ves. 578.

<sup>2</sup> 2 Vern. 401. Prec. Chan. 118.

<sup>3</sup> 1 Jac. & Walk. 476.

<sup>4</sup> See *Earl of Salisbury v. Newton*, 1 Eden, 370.

<sup>5</sup> See cases cited in *Elliot v. Cordell*, 5 Mad. 149.

here to be observed, that though the courts of equity may seem to have deviated in this respect from the rule that "equity will not take away the benefit of survivor from the wife, of such things as the law has cast upon her,"<sup>1</sup> yet there is a reason exclusively applicable to a married woman's equitable interests, which seems to afford a sufficient warrant for their so doing. We are to remember that the principal object a court of equity has in view with regard to the property of a woman in its own power, or which is to be reached only by its authority, is, to obtain a settlement for her out of it.<sup>2</sup> Subject to that consideration, it regards such property as belonging to the husband, and disposable by him during his life. "Her equity," said Sir William Grant, in *Woollands v. Crowcher*,<sup>3</sup> "is, not to prevent his receipt of it (for it belongs to him), but to have a settlement, and the court requires her consent to the payment to him without a settlement." In compelling the assignee therefore to make a settlement, the object of the court with regard to such property is answered. Moreover, as interests of this nature are cognizable solely in the courts of equity, those courts, in allowing the husband a power of sale over them, infringe no principle of law. They observe, with respect to the subjects of their peculiar jurisdiction, an analogy to the rule of law so far as is compatible with the objects of that jurisdiction. Allowing these reasons to be sufficient for the determinations of the courts of equity with respect to mere equitable interests, it is obvious that they do not at all apply to legal choses in action—property recoverable without their intervention, out of which they have no power of enforcing a settlement, and of which they cannot deprive the wife without distinctly violating a principle of law in analogy to which they profess to act, even with respect to subjects peculiarly cognizable by them. However, it has been frequently asserted in arguments of counsel and in treatises, that an assignment of the wife's choses in action, legal as well as equitable, will be supported in equity, (if made for valuable consideration) against the wife surviving. In *Mitford v. Mitford*, Sir William Grant thus alluded to the doctrine, in order to get it out of his way in considering the

<sup>1</sup> Tr. of Equity, B. 1. ch. 4, s. 24.

<sup>2</sup> *Packer v. Wyndham*, Proc. Chan. 418.

<sup>3</sup> 12 Ves. 177.

effect of an assignment in bankruptcy. "By assignment for valuable consideration, *it is said*, she (the widow) is bound both as to choses in action, and equitable interests. *Bates v. Dandy*,<sup>1</sup> and *Lord Carteret v. Paschal*."<sup>2</sup> The first of these authorities is always cited as that upon which the doctrine in question rests for support.<sup>3</sup> It is simply an *obiter dictum* attributed to Lord Hardwicke, that "the husband may assign the wife's chose in action or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration." With respect to this proposition it may be remarked, without in any degree derogating from the respect due to any legitimate expression of the opinion of that great judge, that it is contained in what we have reason to know (from the statement in the Registrar's book),<sup>4</sup> to be an exceedingly imperfect and garbled report of the case. Could we suppose it to have been laid down by his lordship as a principle upon which his decision was founded, or which had anything to do with it, we might more safely place some reliance upon it. But, it is certain from the facts of the case, as stated in the official record of it, that the dictum in question was wholly uncalled for by the circumstances upon which Lord Hardwicke had to adjudicate. The case turned upon the validity as against the wife surviving of a deposit made by the husband, with an agreement to assign (by way of security for a debt) certain mortgages, one in fee, and another for a term of years allotted to the *husband and wife*, as the wife's share of a residuary personal estate; which share, at the time of such deposit and agreement, had (as appears from the Register Book, though not from the report), been transferred to the *husband and wife*. The legal estates in the mortgages remained outstanding, the parties in whom they were vested covenanting to convey or assign them to the *husband*, or as he should appoint. Under these circumstances (the specific property in question never having been exclusively the wife's choses in action), there could, it should seem, be no doubt of the husband's power of disposition in equity, with or without consideration. In *Carteret and Paschal*, it is merely stated, that "It was agreed, that where the baron is in right of his

<sup>1</sup> 2 Atk. 208.

<sup>2</sup> 3 P. Wms. 197.

<sup>3</sup> See 1 Fonbl. Equity, 318.

<sup>4</sup> 1740. A. 408, 409.



wife entitled to a chose in action, as he may release or forfeit it, so if he should assign for a valuable consideration, it would be good." This observation also bears no relation to the subject of the decree in that case; which was grounded upon the fact of the husband's having acquired a legal power over the property in question, by the possession of certain premises. Such are the authorities in support of the proposition in question! The following observation of Sir Thomas Plumer, in *Purdew v. Jackson*,<sup>1</sup> seems justly applicable to the stress which has been laid upon them. "It is possible that opinions may occasionally be afloat, founded on loose expressions and scattered dicta, sometimes uttered without mature consideration, sometimes inaccurately or imperfectly reported, which pass from one man to another, and are gradually received and acted upon as forming the law, without sufficient authority for such a conclusion." This learned judge, in the case just cited, (in which it was after great discussion and deliberation settled, that an assignment for valuable consideration of the wife's reversionary or contingent interests does not defeat her claim by survivorship), took occasion to ask,<sup>2</sup> "Is there any case in which the husband having assigned the wife's present chose in action, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife?" The counsel for the assignee in that case (Mr. Sugden) admitted that he knew of none.

While upon the subject of authorities, it would be improper to pass without notice an inaccuracy into which Mr. Roper appears to have fallen, in so stating the substance of Sir William Grant's judgment in *Mitford v. Mitford*, as to lead his readers to conclude, that the learned judge signified his opinion, that a sale of the wife's chose in action by the assignees of the husband, under a commission of bankrupt, would have the effect of defeating the wife's claim by survivorship. The inference to be drawn from this proposition, with respect to the husband's power, is so obvious, that it is important to shew with what fairness the proposition has been ascribed to that judge. Mr. Roper states,<sup>3</sup> that in *Mitford v. Mitford*, "Sir William Grant decided in favour of the wife, upon the princi-

<sup>1</sup> 1 Russell, 63. affirmed on appeal by Lord Lyndhurst.

<sup>2</sup> lb. 19.

<sup>3</sup> 1 *Husb. & Wife*, 229.

ple, that this being a *chose in action* and not reduced into possession during the husband's life, survived to her; and that an assignment under a commission of bankruptcy, although it passed her share, passed it to the assignees *sub modo*, viz. provided they received the share *or its value* during the marriage," &c. Shortly after, the learned writer adds, "the court of Chancery in analogy to the rule of law decreed, that as neither the husband nor his assignees had, during his life, reduced the wife's share into possession *by sale or otherwise*, it necessarily survived to her upon his death." Here we must presume that the learned writer did not intend to state a fact, but merely *his conclusion* respecting it. For in the first place, there is not a syllable in the judgment expressive of an opinion as to what would be the effect of a sale of the wife's chose in action *by the assignees*. On the contrary, the Master of the Rolls expressly confined himself to the consideration of the effect of the assignment by operation of law in bankruptcy. He noticed cursorily the alleged effect of a sale by the husband himself in terms (such as, "it is said," "supposing this doctrine to be established," "if such be the rule,") implying, that he regarded the doctrine merely as an assumption, and as having nothing to do with the question before him. In the next place, Mr. Roper thus explains in a subsequent passage<sup>1</sup> his statement of this judgment:—"Sir William Grant's observation, that the wife's property being a chose in action, and not reduced into possession during the husband's life, survived to the wife, must, *it is presumed*, be considered in an extensive sense, importing that the assignees having neither reduced the property into their possession, nor *disposed* of it for value, in the lifetime of the husband," &c. "This interpretation of the expression of the Master of the Rolls," Mr. Roper says, is founded upon the husband's legal power over his wife's personal estate, whereby his assignment of her real chattels, whether in possession or remainder, intercepts at law her title by survivorship. The fallacy of the notion, that the courts of equity would, in deciding against the wife's claim by survivorship in the case of assignment of her choses in action, observe an analogy to the husband's legal power of assigning, with or

<sup>1</sup> 1 Husb. & Wife, 231.

without consideration, his wife's chattels real, or chattels personal in possession, has been sufficiently exposed in the case of *Purdew v. Jackson* before cited, where it was much pressed upon the court. It is moreover worthy of note, that in this very judgment of *Mitford v. Mitford*, the following observations of Sir William Grant seem designed to shew the wide distinction between the cases. "As at law her *choses in action* not reduced into possession by the husband, survive to her, so do her equitable interests in the same case survive to her in equity. *But there are some legal interests which do not admit or stand in need of being reduced into possession*; being in possession already, and not lying in action; as terms for years, and other chattels real, of which the legal title is in the wife. They will survive if no act is done by him; but he may assign them, which passes the legal interest, whether with or without consideration: the analogy is followed in equity. Equitable interests of the same nature may be transferred in the same manner." It seems obvious, that as to such legal interests of the wife as do not lie "in possession," (in other words, *choses in action*), the true line of proceeding in equity, in analogy to the courts of law, is to decide that the assignment of them by the husband, whether with or without consideration, shall not affect the right of the wife surviving. The assumption of Mr. Roper, above noticed, as to the effect of the judgment in *Mitford v. Mitford*, might not in itself be important, did he not appear mainly to rest upon it (not citing any other authority) his statement of the doctrine we are considering. "If then such assignees (in bankruptcy) are able by their assignment for value to bar the wife's title by survivorship to her own reversionary *choses in action*, for the reasons before given, it follows, that *an assignee of the husband for a valuable consideration* of the wife's *choses in action*, whether they be immediately recoverable, or be in remainder, &c., *will also be entitled to hold them against the wife's claim by survivorship.*"<sup>1</sup> When we find so important a statement resting upon such grounds, it is but proper to warn the student of the possibility of being misled, even by so respectable a text writer as Mr. Roper.

On the other hand, in favour of the wife's claim by survivor}

<sup>1</sup> 1 *Husb. & Wife*, 238.

ship, there are many dicta which, taken abstractly, seem to go the whole length of the proposition here contended for. As however, in truth, it may be doubted whether they were not intended to apply principally to the wife's equitable property, respecting which, the doctrines of the courts of equity have in some points been till lately very unsettled, the bringing of them into this discussion would only increase the great amount of unfair reasoning which has been applied to this subject. In the case, however, of *Burnet v. Kinaston*,<sup>1</sup> referred to by Sir William Grant, is a dictum of the lord keeper Wright, strictly in point. It was explicitly laid down by that judge, that "If a husband assigns a bond of his wife for valuable consideration, this assignment will not bind the wife if she survives."

Seeing, therefore, that the wife surviving, has by the common law of England (and not by the authority of the court of Chancery), an absolute right to such part of her personal property, of a legal quality, as at the time of her husband's death remains "in action;" and that no case is to be found in which a court of equity has deprived her of such property; it remains to be seen, what "equitable" grounds have been alleged for establishing against her the claim of the assignee. We are told, that "the property is altered."\* If the expression is meant to be applied to the transfer of the husband's interest to the assignee, its correctness cannot be denied. Undoubtedly, all that the husband has to transfer passes by the assignment. But this argument goes too far; for (as was observed by Sir Thomas Plumer<sup>3</sup>), "in bankruptcy also the property is changed, every thing being transferred to the assignees which the bankrupt himself could lawfully part with." Yet it is quite settled, that the wife's claim is not thereby affected. "The property" (in this sense of the word) which the husband has, is a right to reduce the thing into possession during his life. What more a purchaser can take by the transfer is inconceivable, for how can an absolute right to any thing pass, by an assignment of any description, out of one who had in himself but a limited and defeasible interest? "If," said Sir William Grant, in *Morley v. Wright*,<sup>4</sup> "the husband has but the right of reducing the wife's interest into possession,

<sup>1</sup> Prec. Chan. 118. 2 Vern. 402.

<sup>2</sup> Ib. 27.

<sup>3</sup> 1 Russell, 8.

<sup>4</sup> 11 Ves. 17.

how can he for valuable consideration, or otherwise convey more than he has? If he does not reduce it into possession, it clearly survives. If then he parts with it for valuable consideration, and the assignee acquires a right different from that which the husband had, he parts with something different, from what he has." If on the other hand, by "the property" it is meant that the subject-matter is altered, what ground is there for such an assertion? It is as much "in action," and therefore as much within the application of the rule of law, after the assignment as before. An action is as necessary on the part of the assignee as on that of the husband, with this difference, that though the husband might have sued for the recovery of it in his own name only, the assignee would have to employ the name of the wife to obtain possession of that property, the unqualified right to which would by law have become vested in her.

What then are the extraordinary claims of the party in whose favor the widow is to be made the passive instrument of her own deprivation, perhaps ruin? He is one who buys a right of action; well aware of the chance of the husband's dying in the lifetime of the wife, and before the chose in action is reduced into possession; and who is *bound to know of the wife's legal right by survivorship*! Is this a case calling for the *interposition* of the court of chancery? Should a man be so ill advised as to purchase land entailed of the tenant in tail, without taking care to have the entail barred before payment of his purchase money, equity would not compel the issue in tail to vest the inheritance in the purchaser. So (to come nearer to the point) "in equity no agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution."<sup>1</sup> There seems no reason for contending, that the purchaser of the wife's property, would in the one case any more than in the other, have that given to him by a court of equity, which he knew at the time of entering into the contract for purchase, it was not competent to the vendor to convey to him. The right to the chose in action vests as clearly in the wife in the one case, as her right to the inheritance in the other; and if there be any truth in the professions of the courts of equity, that a married

<sup>1</sup> Tr. Eq. b. 1. c. 4. s. 23.

woman is an object of their peculiar consideration, the difference in the nature of the property in question cannot afford a ground for an opposite line of conduct in the two cases. It would surely be as inconsistent with the principles of a court of equity as it certainly would be contrary to a clear legal principle, to deprive the widow of her property, in order to make good the speculation (for it is no more) of a dealer in suits at law.

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WHETHER PAYMENT OF PURCHASE MONEY WILL TAKE A  
PAROL AGREEMENT FOR THE SALE OF LANDS OUT OF THE  
STATUTE OF FRAUDS.

FREQUENTLY as this most important point has occurred, the courts of equity (strange to say) have left it in an extremely unsettled state; and as it has not yet received the attention it deserves, either from text-writers, or the great judges who have occasionally touched on it, we propose to give it a brief discussion, and shall endeavour to elicit the principles on which it rests.

We shall begin with observing that the question, in our opinion, depends entirely on the statute of frauds, and that the doctrines of equity, with respect to it, before that statute, are immaterial. This position, though seemingly obvious, we shall endeavour to establish, as one of the most popular of professional authors<sup>1</sup> enters upon the subject with a different impression. Mr. Sugden commences his examination of the doctrine with the four cases in *Tothill*,<sup>2</sup> which arose previously to the statute, and which, he remarks, appear to be applicable to the point under consideration; as equity, even before the statute, would not execute a mere parol agreement not in part performed. But whoever scrutinises the cases to which that gentleman refers, will, we think, be convinced that they do not support his proposition; and the firm

<sup>1</sup> Sugd. Vend. 107.

<sup>2</sup> *William v. Nevil*, *Tothill*, 135. *Ferne v. Bullock*, *ibid.* 206. *Clarke v. Hackwell*, *ibid.* 228. *Millar v. Blandist*, *ibid.* 85.

and positive language in which it is stated, forms a singular contrast to the manner in which he gives their specific results.

In two of them (*Ferne v. Bullock*, and *Clarke v. Hackwell*) "parol agreements were," he says, "enforced, apparently on account of the payment of very trifling parts of the purchase money; but the particular circumstances of those cases do not appear." And he concludes this part of his inquiry with observing, that though the decisions are not easily reconcilable, yet "the result of them clearly is, that payment of a trifling part of the purchase money was not a part-performance of a parol agreement." We apprehend that Mr. Sugden has forgotten the simple principle on which the doctrine depended prior to the statute of frauds, and that a recurrence to it will solve the difficulties, and reconcile the apparent contradictions, of the cases he has quoted. Before the statute there was not (as Mr. Sugden has imagined) any substantive *rule* in the courts of equity, that they would not execute a parol agreement, not in part performed. On *principle* a parol agreement, *if proved*, would have clearly bound the parties; but such an agreement was *difficult of proof*, and therefore the courts naturally *leaned against it*, except when it was fortified by concomitant circumstances of an unambiguous complexion. Of these circumstances, the part performance of the agreement, by the payment of the whole or any part of the purchase money, was one of the most decisive; but still it was important only as raising a presumption, and might consequently have been repelled by others of an opposite tendency. When, however, but a trifling sum was paid, the act was more equivocal, and therefore more controllable by positive evidence or accompanying facts. This explanation coincides with the true rule, which in a book of authority is expressed to be, that "the court *was very cautious* of relieving bare parol agreements for lands, not signed by the parties, nor any money paid."

We now come to the statute itself (29 Car. 2. c. 3.) which declares generally, that no contract relating to lands shall be binding, *if not in writing*. The student who has been taught in elementary text-books, that the power of parliament is transcendant, and its enactments equally binding on all our

courts of judicature, will be not a little surprised to find that equity continued, in some cases, to act as if this statute had no existence.<sup>1</sup> In the first case, indeed, subsequent to the statute, we find it laid down that a contract [parol] for land, and a great part of the money paid, is void.<sup>2</sup> And this case appears to have been generally<sup>3</sup> acted on, until the time of Lord Hardwicke, who laid it down broadly, that paying money had always been considered as a part performance;<sup>4</sup> a dictum which, taken in its full extent, would *virtually* sweep away the line of demarcation between the ancient and modern doctrines of equity on this subject, and almost render the above enactment a dead letter. We *afterwards* find the distinction taken between the payment of a *considerable* and an *inconsiderable* part of the purchase-money;<sup>5</sup> but this distinction, if in other respects sound, would be rendered unsatisfactory from the vagueness of the word *considerable*, and the consequent necessity of taking the opinion of the Court on every case that arises until some definite proportion is fixed.<sup>6</sup> Finally comes a decision by Lord Redesdale, *holding clearly, that payment of purchase money is not a part performance, and had never been deemed so.*<sup>7</sup> That the *assertion* with which this proposition is accompanied, is ill-considered, is evident from the authorities which have been referred to in this brief deduction; but the *decision* we conceive to be right in its fullest latitude, and we unite with Mr. Sugden<sup>8</sup> in hoping that it will set the point at rest. The unsettled state of this doctrine strikingly exemplifies the evils which courts of equity produce when they aim at too much. In the

<sup>1</sup> It is not quite unusual for courts of equity to set their veto on acts of parliament, and render the passing of them totally nugatory. They exercised this *constitutional* prerogative in the instance of the statute which required two witnesses for a will of money in the funds, 35 G. 3. c. 14. s. 16.

<sup>2</sup> Freem. 486. pl. 664 b.

<sup>3</sup> The doctrine of this case *seems* to have prevailed in *Leak v. Morrice*, 2 Cha. Ca. 135. 1 Dick. 14. 5. to have been rejected in the subsequent case of *Alsop v. Patten*, 1 Vern. 472. and to have revived in the still later cases of *Seagood v. Meale*, Prec. Cha. 560. and *Lord Fingall v. Ross*, 2 Eq. Ca. Abr. 46. pl. 12.

<sup>4</sup> In *Lacon v. Mertins*, 3 Atk. 1.

<sup>5</sup> *Main v. Melbourne*, 4 Ves. J. 720.

<sup>6</sup> Mr. Sugden (*Vend.* 112. 7 Ed.) properly remarks, that the reasoning of Sir Wm. Grant, in *Butcher v. Butcher*, 9 Ves. J. 382. is applicable to this point.

<sup>7</sup> *Clinan v. Cooke*, 1 Scho. & Lef. 22.

<sup>8</sup> *Vend.* 113.



present instance the legislature has, in the most positive manner, required the agreement to be in writing. What course might we have expected the courts of equity to follow? What was, undoubtedly, anticipated by the legislature? That equity would, *under all circumstances, have held a parol agreement to be void.* This would have been to construe the statute in a mode which would have precluded frauds arising from the specific source at which the legislature aimed, viz. from agreements being by parol. But the courts of equity reasoned thus. The statute was passed to preclude frauds, and it would be to make it a medium of fraud, if we do not enforce parol agreements which have been partly performed. The answer to which is, that after an enactment expressly requiring every agreement for the sale of lands to be in writing, those who choose still to rely on agreements by parol, have no more to complain of in such agreements being regarded as actual nullities, than if they were to neglect any other positive declaration of the legislature.<sup>1</sup> We are glad to find that Lord Redesdale has viewed this subject in the same light. His lordship added, that "the great reason why part payment does not take parol agreement out of the statute, is, that the statute has said that in another case, viz. with respect to *goods*, it shall operate as a part performance. And the courts *have therefore considered* this as excluding agreements for land, because it is to be inferred, that when the legislature said it should bind in case of goods, and was silent as to the case of lands, they meant it should not bind in the case of lands." We trust that this decision, which is consonant to the true spirit of a wholesome statute, will be established, though failing, as we conceive it does, in that part of its premises to which we have above alluded. But though judicial determinations have, in an infinity of instances, grown into principles, and become irresistible authority, yet when founded on a *statute*, which may always be referred to, and the construction of which is open to the courts at all times, precedents are not

<sup>1</sup> It seems that no part performance takes a case out of the French enactment. "With us," said Mr. Brougham, in his late speech on the state of the law, "the things are so numerous which take transactions out of the statute of frauds, that the memorandum is only in a small proportion of cases required."—Colburn's Edition, p. 90. We agree with him, that as almost all men are able to write at the present day, its outlets should be stopped up.—Ibid.

wanting to show that a series of *dicta* and decisions, however long, may be subverted, if considered to militate against its real meaning and policy.<sup>1</sup>

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A BIOGRAPHICAL SKETCH OF MR. FEARNE, WITH SOME OBSERVATIONS ON HIS ESSAY ON CONTINGENT REMAINDERS, &c.

THE lives of men devoted to scientific or literary pursuits can rarely be chequered by that diversity of incident, which gives biography its principal charm. They are, however, scarcely less interesting on this account to those who are treading the same paths, and who, fixing their eyes on the useful or splendid results of intellectual labour, naturally contemplate, with nearly an equal pleasure, the means of their production.

Charles Fearn was the eldest son of — Fearn, Esquire, judge advocate of the admiralty, who presided at the trial of the unfortunate Byng, and who, on that remarkable occasion, and in the general course of his profession, was esteemed a very able and learned man. He gave his son Charles the first rudiments of education himself, and at a proper age sent him to Westminster School, where he was soon distinguished for classical and mathematical attainments. Being designed for the law, as soon as he had finished his education at this seminary, he was entered at the Inner Temple, but with no fixed resolution to become a barrister. His life had hitherto passed in making excursions from one branch of learning to another, in each of which he made very considerable advances, and might perhaps have succeeded in any. During this state of irresolution his father died.<sup>2</sup>

The interest with which our author is regarded, as the first who successfully digested and elucidated the most abstruse,

<sup>1</sup> It seems to have been on this principle that the House of Lords proceeded, when in the great case of *Fytche v. the Bishop of London*, it determined (May 1783) that a general bond to resign at the patron's request was illegal.

<sup>2</sup> Chalmers' B. D. vol. xiv. 159.

multifarious, and obscure department of our law of real property, will be much augmented when it is known that he was one of those who, in the commencement of their professional career, have had to struggle with the *res angusti domi*, and overleap "poverty's unconquerable bar." But the circumstance was far more honourable to him than to those who have merely surmounted the obstacle of poverty. This will be shown by the following fact, which (it has been justly remarked<sup>1</sup>) may be looked on as the blossom of that independence and generosity which distinguished him through life. His father, besides being at a great expense for his education, presented him on his entrance into the Temple with a few hundred pounds, to purchase chambers and books; yet generously overlooking these circumstances, left his fortune, which was inconsiderable, to be equally partitioned between our author and a younger brother and sister. The former, however, sensible how much the family property had been wasted on his account, nobly refused the advantage of the will, and gave up the whole residue to the other children. "My father," said he, "by taking such uncommon pains with my education, no doubt meant that it should be my whole dependence; and if that won't bring me through, a few hundred pounds will be a matter of no consequence."<sup>2</sup>

Those who know the absorbing nature of legal studies, when pushed to the extreme essential to success, or rather to eminence, will learn with surprise, that Mr. Fearn was not merely a general scholar, but "profoundly versed in mathematics, chemistry, and mechanics. He had obtained a patent for dyeing scarlet; and had solicited one for a preparation of porcelain. He had composed a treatise in the Greek language on the *Greek accent*: another on *the retreat of the ten thousand*."<sup>3</sup>

The following circumstance, while it shews the versatility of his talents, and the variety of his pursuits, will evince from how low a situation he climbed to the eminence which he subsequently attained. A friend of the reminiscient (says

<sup>1</sup> Percy Anecdotes, (Bar) 159.

<sup>2</sup> Chalm. xiv. 160. We are glad to say, that the brother and sister, who were equally amiable and delicate, were both of them afterwards happily settled.

<sup>3</sup> Butler's Rem. vol. i. 118.

Mr. Butler in his *Reminiscences*)<sup>1</sup> having communicated to an eminent gunsmith a project of a musket, of greater power and much less size than that in ordinary use, the gunsmith pointed out to him its defects, and observed, that "a Mr. Fearn, an obscure law-man, in Breames' Buildings, Chancery Lane, had invented a musket, which, although defective, was much nearer to the attainment of the object."

Great attainments are sometimes the fruit of plodding and habitual industry, which, being unaccompanied by native comprehensiveness of mind, not unfrequently loses the end in the means; but they are sometimes the result of that fervid thirst of knowledge, and love of honourable distinction, which distinguish superior minds; and it is then that they become objects of rational admiration. That Mr. Fearn belonged to the latter class, that it was an ardent temperament which carried him forward in the pursuit of information and professional character, will appear from the following fact, recorded by his friend Mr. Butler. He told that gentleman, that when he resolved to dedicate himself to the study of the law, he burned his profane library, and wept over its flames; and that the works which he most regretted were *the Homilies of St. John Chrysotom to the people of Antioch, and the Comedies of Aristophanes*.<sup>2</sup> When men remarkable for great attainments and love of literature, resolve to apply almost exclusively to a rugged, and, as they may deem it, a barren science, the sacrifice is always great. His burning the composition which he valued, may appear to vulgar minds simply an act of caprice or folly; but in the imposition of a painful, perhaps an unnecessary, restriction, those who are better acquainted with human nature recognise that devotedness which indicates the energy of a concentrating mind, and the ardour of a generous ambition.

It was, however, a *misfortune* which first induced our author to revert to his original profession, with unremitting diligence. In his practice of experimental philosophy, he fancied that he had discovered the art of dyeing morocco leathers of particular colours, and after a new process.

<sup>1</sup> Butler's Rem., vol. i. 118.

<sup>2</sup> Ibid 119.

It appears, that the Maroquoniers in the Levant (who are called so from dressing the skin of this goat, named the Maroquin) keep secret those ingredients which give their liquor its fine red. This secret, or what would answer equally well, Fearn thought he had found; and like most projectors, saw great profit in the discovery. It was his unlucky connection in this scheme with a needy and expensive partner, which opened his eyes to the fallacy of his hopes and restored him to the law.<sup>1</sup>

He had not long been in chambers, when his habits of study, diligence, and sobriety, were observed; and the extremely able manner in which he arranged and abstracted an intricate set of papers for an eminent attorney in the Temple, first give him business.<sup>2</sup> After, however, he had established his reputation, and could have commanded what business he pleased as a chamber counsel, he resolved not to throw up entirely his original pursuits, and accordingly contracted his practice within a compass just sufficient for his wants. The time which he denied to increase of business, he generally spent at his house at Hampstead, and devoted to experimental philosophy. He made some optical glasses on a new construction, which have been deemed improvements; formed a machine for transposing the keys in music; and gave many useful hints in the dyeing of cottons and other stuffs. These he called his dissipations;<sup>3</sup> and with some truth, as the frequent neglect of his professional employments certainly obstructed his advancement, while his unintermitting application to study seriously impaired his health. His conduct, with respect to his philosophical experiments and mechanical inventions, evinced the generosity of his disposition; the first of them he freely communicated to men of similar pursuits; and the latter, when completed, he as liberally gave away to poor artists or dealers in those articles.

He was not, however, without less intellectual recreations. We have heard from a gentleman, acquainted with the habits of this singular man, that when he could quit the metropolis,

<sup>1</sup> Chalmers' B. D. xiv. 160.

<sup>2</sup> Ibid.

<sup>3</sup> Chalm. *ubi sup.*

his favourite resort was the sea-coast, where he amused himself with his boat, and frequently remained till the calls of business became pressing. He would then at once shake off his indolence, vigorously apply himself to ~~the~~ papers, and despatch them with astonishing rapidity. ~~He was~~

Dialectics appear to have been his favourite study, and after he became engaged in business, he delighted to apply his refined logic to legal topics. This is evinced by his arguments in the very singular cause of *the representatives of General Stanvix and his daughter*; in which a father and his daughter were cast away in the same vessel, and not a person on board was saved, and the question was, which should be presumed to have died first. This case, which seemed to mock every principle of judicial decision, was brought before the court of Chancery, in the year 1772,<sup>1</sup> and met with a singular discussion. In the arguments which Mr. Shadwell published in Mr. Fearne's posthumous works, it was (that gentleman tells us) our author's intention to try what could be advanced on it with some appearance of reason. But he was not actuated by a parade of logical ingenuity. The compositions adverted to were never shown by the author but to a few select friends. They were merely a work of amusement.<sup>2</sup>

Mr. Fearne's general indifference to pecuniary emolument, the absorption of his time by scientific pursuits, and (we believe) the failure of some mechanical speculation which his philosophical discoveries had induced him to form, clouded the evening of his days. Like Lord Bacon, and from a similar cause (in part), he died poor.<sup>3</sup> The profession, however, were gainers by that event, as but for it they would probably have never been presented with his valuable *posthuma* which were published by Mr. Shadwell for the benefit of Mrs. Fearne.

The professional character of Mr. Fearne stands almost without a rival. His essay on the most abstruse doctrine of the law of real property, "Contingent Remainders and Executory Devises," is generally considered as a most beautiful

<sup>1</sup> Reported in 1 Bl. Rep. 640.

<sup>2</sup> See 1 Mer. 308.

<sup>3</sup> January 21, 1784, ætat. 45, worn out, it is said, in mind and body.

combination of logical accuracy and profound legal learning. And these are not its only merits. The style of it, which is peculiar, not to say original, has not merely perspicuity and exactness, but much vivacity and elegance; and the complete success it met with, is a striking proof how effectively subservient literature and science may be to the illustration of the most abstruse departments of our law. The last edition of this work, by Mr. Butler, is not, in our opinion, altogether worthy of his great abilities. The repetition of the propositions of the text at the bottom of the page, almost *totidem verbis*, answers no useful purpose; and there are, we think, some glaring inaccuracies in his numerical analysis.

The logical groundwork of the Essay on Contingent Remainders, even to the definition and primary classification of the topics, we must, however, presume to question. We cannot but think that its author was somewhat hasty in the assumption of his premises. For example, he defines a contingent remainder to be "a remainder limited so as to depend on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate." But a little reflection will show that this definition does not comprise *remainders contingent merely on account of the person*;—as in a limitation to two for life, remainder to the survivor of them; where there is *no* contingent *event* or *condition*, but a present capacity in the remainder to take effect in possession whenever the particular estate determines by the death of the first of them. We would accordingly define a contingent remainder to be a remainder which is limited to a person who is not ascertainable at the time of the limitation, or which is referred for its vesting or taking effect in interest, to an event which may not happen till after the determination of the particular estate. We shall also presume to attack Mr. Fearne's classification; and our objections are two-fold. First, that as it comprises that class of remainders, which are contingent *only on account of the person*, it does not fall within his own defini-

<sup>1</sup> Not being a professional man (observes the late Doctor Parr, in a letter to Mr. Butler, vol. ii. of that gentleman's *Reminiscences*,) I was continually foiled by the Essay on Contingent Remainders. But I saw enough to convince me that his powers of reasoning were gigantic.

tion, from which it is professedly deduced; that definition (as has above been shown) applying only to remainders contingent on account of the event. Secondly, that it is totally arbitrary, as it assumes, without a shadow of proof, that a difference in the events on which contingent remainders depend, makes a difference in the remainders themselves. The reverse of this we affirm to be open to strict and clear demonstration. If A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over to D. in fee, (which is an instance of Mr. Fearne's first sort of contingent remainders); if lands be given to A. in tail, and if B. come to Westminster Hall on such a day, to B. in fee (which exemplifies his second sort of contingent remainders); if a lease for life be made to J. S., and after the death of J. D. the lands to remain to J. W. in fee (which illustrates his third sort); it is very certain that the remainders of D. B. and J. W. are not in the slightest degree distinguished by the law; for *the nature of the event does not affect the qualities of the remainder*. We therefore reject this classification, and form another on what (as we think) is its only rational basis, viz. a *difference in the qualities of the contingent remainders*.<sup>1</sup> Hence our division would be two-fold. The primary one would be into such remainders as are contingent on account of the event, and such as are contingent on account of the person; because these *differ* in some of their *qualities*, a contingent remainder being devisable when the *event only* is *uncertain*, but *not* when the *person* is *unascertained*. [This was decided by the cases of *Roe v. Jones*, 1 Hen. Bl. 30. *Moor v. Hawkins*, 1 H. Bl. Rep. 33. and *Jones v. Perry* in error, 3 T. Rep. 88.] Our secondary division of contingent remainders would be into those which are at common law, and those which are by devise or by way of use; and this we derive from the *difference* between contingent limitations in common law conveyances, and limitations in wills and conveyances to uses; the *former* kind, when vehicles of the fee, putting it in abeyance, and the *latter* not.

This is not so much an aggression on the legal reputation

<sup>1</sup> Is it not in any science absurd to adopt any other criterion of identity and diversity than this?



as on the logical merit of this far famed essay. After what has been said, we leave the reader to his own opinion of the justness of our criticism.

One of the most singular misapplications of Mr. Fearn's reasoning powers was in his reading on the statute of enrolments. His object there was to prove that a grant of a remainder or reversion, for a pecuniary consideration, is at the present day a bargain and sale, and consequently void without enrolment. The sophistry of his arguments is now universally acknowledged. The grant of a remainder or reversion before the abolition of attornments was precisely analogous to a feoffment with livery of seisin. The pecuniary consideration *then* did not alter the operation of the deed, and make enrolment requisite; and the statute of 4 Ann. c. 16. s. 9. simply made a grant *without*, exactly what it was before *with*, attornment. See the very late case of *Doe v. Cole*, 1 Manning and Ryland, 33.

Mr. Fearn's fault, as a legal writer, was, we conceive, a want of that patient spirit of analysis and research, which can alone be depended on for laying well-founded premises; though we by no means intend to say that he was wholly deficient in this spirit, or did not occasionally, and, as it were, by fits and starts, possess it in an eminent degree. But he was certainly far from being what Lord Thurlow once styled him, one of the most accurate of writers. His excellence consisted in accurate discrimination, in subtle ratiocination, in melting down the huge and shapeless masses of seemingly indigested and incongruous doctrines, and casting them into regular forms,—in detecting anomalies, and crushing them, when pernicious, with the combined and irresistible force of sarcasm, reason, and authority. Lord Mansfield had almost as much cause to dread Mr. Fearn on the legal, as his invisible enemy, Junius on the political, arena.<sup>2</sup> The celebrated case of *Perrin v. Blake*<sup>3</sup> illustrates this. His lordship (then chief justice) thought fit to deny with some indignation his having given as counsel an opinion which Mr. Fearn had ascribed to him on

<sup>1</sup> In *Pering v. Phelps*, 1 Ves. J. 256.

<sup>2</sup> Lord Mansfield, however, did not (as Dr. Parr and many others supposed) persecute Mr. Fearn. See *Butler's Reminiscences*, vol. ii.

<sup>3</sup> 4 Burr. 2579. 1 Bl. Rep. 672.

the subject of the devise in that case, and which was at direct variance with his lordship's judicial determination. This circumstance properly induced Mr. Fearne to publish the opinion,<sup>1</sup> and to demonstrate its authenticity by shewing the source from which he got it; and the strain of irony in which he lamented that he should have been so fatally imposed on by appearances, would have done credit to the pen of Swift. This letter, with the opinions of Mr. Murray, and other eminent counsel, on the litigated will of W. Williams, was published with the fourth edition of the *Essay on Contingent Remainders*, but has been omitted from the subsequent editions.

Mr. Fearne, however, in his ironical attack on Lord Mansfield's decision in *Perrin v. Blake*, was not exactly consistent with himself. His ground of complaint was the desire of that great judge to break through those strict rules of law by which, whatever might be the intention of testators, limitations in wills assuming a certain form, produced a certain effect.<sup>2</sup> And this complaint was just, as without a doubt it is more desirable that property should be secured by firm and settled rules, than that the intention of testators should be effectuated. But if Lord Mansfield was on this ground culpable for setting his shoulder to the rule in *Shelly's* case, how much more so was Mr. Fearne himself for endeavouring,<sup>3</sup> on similar principles to those on which Lord Mansfield reasoned, and by arguments deduced from common sense, and abstract fitness, to subvert the maxim of the common law with respect to abeyance, confirmed as it is by a multitude of decisions, and, we believe, unshaken even by a judicial dictum. There is scarcely a remark of his on Lord Mansfield which does not apply with ten-fold force to himself.

<sup>1</sup> This appeared about 1780, and is said to have afforded Lord Mansfield some uneasiness, who, however, took no notice of it. Chalmers, vol. xiv. 162.

<sup>2</sup> See *Cont. Rem.* 155.

<sup>3</sup> *Cont. Rem.* 361.

*The Court of Chancery. A Satirical Poem.* By REGINALD JAMES BLEWITT, late of Lincoln's Inn.

The object of this book is to embody in immortal verse the reflections of the author on every thing connected with the Chancery. He gives his opinions with equal freedom on the nature of equity in general — the men, the manners, and the proceedings of the court — the personal qualities and private habits of judges, officers, and bar — and comments with equal harshness on the limited expenditure of Lord Eldon, the obesity of Master Stratford, and the country house of Mr. Agar. Those, therefore, who may happen to hear of the publication, are certainly justified in asking who Reginald James Blewitt, late of Lincoln's Inn, may be. We inquired accordingly, and have satisfied ourselves; though we must decline the task of satisfying our readers. We can merely permit ourselves to state, that he was once a practising solicitor; but whether he left his business or his business left him, we cannot venture to decide. He is, or lately was, residing in France, perhaps for his personal convenience, perhaps for the improvement of his property; both of which would very probably have been infringed upon had he been in England on the publication of his poem. It is a wretched attempt to versify abuse: dull prose, forced into couplets by transposing words, and tagging rhymes. "As a poet," says he, "I must throw myself upon the indulgence of the public."<sup>1</sup> We do assure him that the public will not receive him in that character, though at the same time quite ready to believe that he "has thrown into the work as much amusement as his poor abilities would furnish him with."<sup>2</sup> But our readers had better judge for themselves, and we studiously select the specimens, which are the best adapted to convey a notion of his style. Names at full length we cannot copy, and it is wrong perhaps even to venture on initials.

The following is Mr. B.'s opinion of one of the masters; a mild and gentlemanly comment, which would be quite clear and intelligible enough, if one could but make out, whether the gentleman alluded to is to be a bear or "a real ape."

<sup>1</sup> Preface.

<sup>2</sup> Ibid.

Lo! waddling forth; in dignity of mein,  
Corporeal S———d from his haunt is seen.  
That bloated form and pompous belly scan :  
In shape and wit a very alderman!  
Those vulgar looks his vulgar manners stamp,  
For knowledge he ne'er burns the midnight lamp  
The sternest brute will sometimes kindness own,  
Bend as you will, and S——— yet will frown ;  
Enrag'd he fain would kill you with a look,  
Ye weak of skull, beware the flying book.  
Hence to the rocky woods, thou growling bear,  
Hence to the woods, and deal out justice there.  
Hence to the woods; but ere thou dost escape,  
Send to supply thy loss a real ape.  
The suitors scarce will of their lot complain,  
If by the change some intellect they gain.  
Like thee, in gestures may his rage be dealt ;  
Like thee, the luckless volumes he may pelt ;  
Each art expressive of the monkey tribe,  
Well hast thou learnt their natures to imbibe!—p. 18.

The next passage is part of a brilliant and occasionally pathetic appeal to Lord Lyndhurst, who doubtless will profit by the warning.

Be Lord High Chancellor, if so you must,  
But oh! resign some portion of thy trust—  
Its various duties more attention claim  
Than one weak head can muster for the same.

Young Peer be wise, and if you court success,  
Outdo your senior by attempting less.  
His failure served great talents to produce ;  
But what is intellect if not of use ?  
Well could he coin a doubt, or problem make—  
But slow to solve, and there was his mistake.  
His brains were sound ; but little good they did.  
Like some rich jewel in dark cavern hid.  
Quick was his mind each error to perceive ;—  
Much craft had those who could that mind deceive—  
A moment's thought would often shew a flaw,  
Which those who look'd much deeper never saw.—p. 24, 26.

We next give an illustration of the author's mode of sketching the bar, whom he introduces with a most ingenious turn.

Shake all the host together in a hat,  
And take them singly forth, whose name is that?

H——t sallies forth—but why was he put there ?  
His judgeship merges all the barrister.  
Long may he live that dignity to keep,  
And slumber now, as once he lulled to sleep.  
His name half serves my numbers to compose,  
And turn dull poetry to duller prose.  
Still might his long experience fit the place,  
That Copley's sense without can never grace.—p. 51, 52.

Another name ? 'tis thine impetuous H——e  
With fiery temper, and with looks of scorn.  
But little read, or else of feeble brain,  
That can but little at a time contain.  
Prolix of speech but coarse and unrefin'd,—  
Thou hast no symptom of the cultur'd mind.  
Thy words, like water roaring down a rock,  
Astonish all, whose nerves can bear the shock ;  
Both rise in mists, and end at last in foam,  
Thus savage nature feels with thee at home !  
Far, far from me be eloquence so grand ;  
I like to hear, and hearing understand,  
Not race thy tongue thro' all its barren track,  
But stop my ears, for fear the drum should crack.—p. 57.

Next R——e and B——th their names display ;  
The last sedate, the first perhaps too gay.  
This in astuteness, that excels in sense,  
Matur'd by thought, and labour more intense.  
The one with head erect and measur'd stride,  
The pink of glory, and the pearl of pride ;—  
Seems as ambitious of a taller form,  
Or sick of herding with each brother worm.  
That dormant eye and inexpressive cheek  
But little promise in the other speak,—  
In fact not much has either to admire,  
Though each may hope to set the Thames on fire.  
If little R—— can make the waters blaze,  
Be mine the wonder and be his the praise.  
Should plodding B—— obtain the start,  
His head is deeper than his looks impart.—p. 63, 64.

We are bound to say that he can praise occasionally ; but few, we fancy, will wish for his commendation. Here however, it is deservedly though most clumsily bestowed.

From realms of darkness let us turn to light—  
 But where, if not to thee, ingenious Knight?  
 An able draftsman, and a speaker bold,  
 By prudence guided, ne'er by fear controlled,  
 To clients faithful, not to foes unjust,  
 In better hands his suit could no one trust.  
 By honour urged, thou wilt not facts conceal,  
 But with strong argument their force repeal.  
 Thus truth is ever to thy speech attached,  
 Nor hopeless cause by blund'ring falsehood patch'd.  
 With whom can doubt on safer grounds advise?  
 Tho' young in years, so prematurely wise.—p. 67.

On that branch of the profession which he one pursued, six lines contain the substance of his thoughts, and are introduced as felicitously as usual.

But why thus hunt a subject off its legs?  
 I do but teach my grandam to suck eggs:—  
 An art attorneys practise far too well,—  
 Yoke, white, their own—a client takes the shell.  
 What if he grumble, theirs has been the toil,  
 With profit scarce to make the kettle boil.  
 A porter's lot would suit them better far;  
 No anxious cares his peaceful dream can mar;  
 While their reward for nightly want of ease,  
 Just adds a pint of ale to bread and cheese.

Conveyancers might well feel hurt, were they to suspect themselves of being neglected by an individual so discriminating as Mr. B.; and we are glad, therefore, to be able to declare, that he brings them in with particular distinction, with an image which a Spenser might have envied; and minutely analyses the most distinguished of their class.

See from the dust a novel creature spring,  
 The serpent's nature with an eagle's wing!  
 With tooth so sharp, and pow'r to soar as high  
 Thro' all the pathless realms of sophistry!  
 Conveyancer! so call'd, because his art  
 Can change and motion to estates impart!—p. 74.

\* \* \* \*

But these have had their day; and P—— now  
 Assumes the sway with dictatorial brow.  
 And who is he? from whence? and what his claim  
 To be inscrib'd upon the rolls of fame?

In Devon'born, he duly serv'd his time,  
 That long five years' apprenticeship to crime—  
 Which at the desk he spent without a bribe,—  
 The ready copyist, and the unsullen scribe.  
 From Shepherd's Touchstone next he drew a source  
 Of knowledge useful for his future course ;  
 Thence did he learn each deed with curious eye,  
 To scan by practice of anatomy :—  
 As surgeons carefully dissect the heart,  
 To gain experience of each inward part.  
 Thus plodding on, while greater talents slept,  
 He and his doctrines into notice crept,  
 But novelty is past ; and, like the worm,  
 That, for a time, has ta'en some brighter form,  
 Turns to the grub again, when life is gone ;—  
 So P——'s glory into air hath flown.  
 See in his chamber, where you mirror hangs !  
 'Tis there he studies for his court harangues ;  
 Harangues, whereby he seldom gains a cause,  
 Yet never fails to win his own applause.—p. 77, 78.

And this forsooth is the writer who begs pardon "as a poet ;" who gravely tells his readers, that "his principal objects have been truth and consistency ; and presumes to assert, that hē has always been honest in commendation, and never severe without reason."<sup>1</sup> Consistent undoubtedly he is ; there, at least his book will not dishonour him ; it is quite in keeping with itself, and we know nothing in modern literature to match it, except perhaps the Puffiad. As there are no symptoms of a second edition, we hope and trust that it has failed in its principal object, the recruiting the finances of the author ; but were ten thousand copies at this moment circulating, our opinion of its merits would be the same. The dullness of calumny is in some sort redeemable by venom : libels are caught at, though wholly destitute of cleverness ; and we no more admire the man who shows up our acquaintance or contemporaries, though some amongst us may be amused by the attempt, than we should admire a scavenger who was pelting the same persons with dirt, though very possibly we should stop to laugh at them.

<sup>1</sup> Preface.

## LORD LANSDOWNE'S ACT.

*Substance of "An Act for consolidating and amending the Statutes in England relative to Offences against the Person," now under consideration of Parliament.*

WHEN the proposed bill shall have passed into a law, and our criminal code become somewhat more settled than it recently has been, we shall endeavour to take a comprehensive view of this branch of jurisprudence. For the present we shall keep to the act before us, on which our readers may be anxious for information; and, although it has not as yet received the final touches of the legislature, the material parts may be looked upon as fixed.

The laws which owe their existence, or rather, we should say, their existence in their new and comprehensive shape, to Mr. Peel, relate principally to offences against the property of individuals, and to the administration of the criminal law generally; the law introduced by Lord Lansdowne relates to offences against the person.

The first section repeals the whole or parts of between fifty and sixty acts of parliament, passed at different periods, from the 9 Hen. 3. c. 26. to the 3 Geo. 4. c. 114. Of the various and complicated changes which these had severally introduced on the antecedent state of the law, we may perhaps have occasion to speak in a future number; for the present, we will proceed to the second section, which blots the crime of petit-treason from our statute-book. Petit-treason was either where a servant killed his master, a wife her husband, or an ecclesiastical person, secular or regular, his superior to whom he owed faith or obedience. The last of these three cases is evidently a relic of Popish superstition, or church-policy; the two former instances, the second more especially, have been distinguished in almost all ages and countries from the ordinary crime of murder.

With regard to the different kinds of criminal homicide, murder, and manslaughter, the law is left pretty much in the same state that it was before; one or two alterations, which



will be found convenient in practice, have been introduced. The 33 Hen. 8. c. 23., which was extended to accessories before the fact by 43 Geo. 3. c. 113. s. 6., provided that a subject of the king, who committed murder in a foreign state, might be tried in any county which the king should appoint; but in this case, an examination of the accused party must first have taken place before the king's council, or three of them: it is now provided, "that if any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the united kingdom, whether within the king's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place as shall be appointed by the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the great seal, for the speedy trial of such offender." The trial is to take place in the usual way, by a jury of the county; and persons entitled to the privilege of peerage are to be dealt with as heretofore. The provisions of 2 Geo. 2. c. 21. whereby a person might be tried for murder, in cases where the death, or the cause of death only, happened in England, in the county or place in England where the death, or cause of death respectively happened, is by the eighth section of the present act, extended to manslaughter also. The crime of accessory after the fact to murder, instead of being a capital felony with benefit of clergy as heretofore, will now be punishable with transportation for life or imprisonment, with or without hard labour, for any term not exceeding four years.

The late very aggravated case, in which one Howard attempted murder by means of a blunt weapon, has induced the legislature to extend the principle of Lord Ellenborough's act far beyond its original limits, and, as we think,

beyond what public expediency, and the rules of justice can warrant.. The case alluded to could not be dealt with as a capital offence, monstrous as were the circumstances under which it was committed, because Lord Ellenborough's act, 43 Geo. 3. c. 58. s. 1. includes only cases of shooting or attempting to shoot, and stabbing or cutting, the latter of which can be applied only to sharp weapons; that it would be expedient to bring such cases as that of Howard's within the operation of the statute, we do not hesitate to say, but we think the remedy, as at present proposed, is worse than the disease.

Two sections of the present act are substituted for that part of Lord Ellenborough's act which related to the offences of stabbing, cutting, shooting, &c. with intent to murder, maim, disfigure, or disable any person, or with intent to resist or prevent the lawful apprehension of the party himself, or any of his accomplices; as the shape in which these sections are put is very different from the provisions of Lord Ellenborough's act, it may be better to give them at length: the first of these sections, which in the bill as it at present stands, is the eleventh<sup>1</sup> section of the statute, is as follows:—"Be it enacted, that if any person unlawfully and maliciously shall administer, or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person; or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." On comparing this section with Lord Ellenborough's act, it will be found that attempts to administer poison, to drown or strangle, and wounding with intent to murder, are entirely new. The twelfth section is as follows: "And be it enacted,

<sup>1</sup> It should be observed that, as the intended law is at present only in the shape of a bill, the sections are not yet numbered; we, therefore, can only refer to the clauses as at present divided.

that if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof shall suffer death as a felon." The statute proceeds to enact, that if it shall appear on the trial that the offence was committed under such circumstances, that if death had ensued, the crime would not in law have amounted to murder, the defendant shall be acquitted of felony. The word "wound," it is apprehended, will include weapons of all descriptions, whether sharp or not, and should that be the case, and this statute acted upon to the letter, the consequences will indeed be fearful: for every aggravated assault on a constable, where, as not unfrequently happens in alehouse-squabbles, the man of authority gets a broken head, will become not only a felony, but a capital felony, nay, not only a capital felony in the person actually inflicting the blow, but in all present aiding and abetting the resistance or prevention of his lawful apprehension. In cases where several persons are indicted for assaults on a constable, it generally happens that one or two only actually struck the prosecutor, but that the rest were present joining in the affray; and it is very often a difficult matter for the jury to decide, when a great number of persons have been assembled together, whether some of those who are indicted were actually engaged in resisting the constable, or merely lookers-on enjoying the row, or even taking the constable's part: this has always afforded a fair opportunity for a spiteful neighbour, and it may be added too, for an ill-natured justice of the peace, who wish for an opportunity to bring their victim within the clutches of the law, to promote (not to use a harsher expression) the conviction of an innocent man; and there can be no doubt that imprisonment is fre-

quently awarded to those who have had no share in the breach of the peace ; but hereafter, under the present statute, should blood be drawn, an indictment containing four or five counts, gravely stating that A. B., the principal offender, with a certain weapon, to wit, an iron poker of the value of sixpence (seized perhaps from the pot-house hearth), inflicted severe wounds of the length of two inches, and depth of half an inch, first with intent to murder, then to maim, then to disfigure and disable, and lastly with intent to resist and prevent the lawful apprehension of the said A. B. ; and further stating, that C. D. and a dozen others were present counselling, aiding, abetting, comforting, assisting and maintaining the said A. B. the aforesaid felony to do and commit ; on which indictment if the jury are convinced that any of the persons were present, aiding or abetting the principal offender in resisting his lawful apprehension, they cannot conscientiously do otherwise than find such persons guilty of a crime which the law declares to be a capital felony. We think that in cases of this kind a line might be drawn between cases where there is express malice, and those where the law only implies malice ; and that at least the jury might be enabled by their verdict to find all or any of the defendants guilty of a misdemeanor only, so as to bring them within the operation of a subsequent section of this act, which makes a person assaulting with intent to resist or prevent the lawful apprehension or detainer of the party assaulting, or of any other person, liable to imprisonment for two years, and fine.

A clause was inserted in the House of Lords, we believe, at the suggestion of Lord Tenterden, enabling the jury, on an indictment for an attempt to commit murder, except in cases of an attempt to poison, to find by their verdict that the principal by his own voluntary act desisted from carrying his purpose into full effect ; in which case punishment of death should not be awarded, but the offender, his counsellors, aiders and abettors be deemed guilty of felony, and liable to imprisonment for not more than two years : this provision has been rejected by the House of Commons, and perhaps would be inconsistent with the severity of the section which we have last quoted ; still however we think that some such encouragement might profitably be held out to the repentant murderer.

Few people, perhaps, but those who have been actually conversant in cases of this description, would think that the murderer would of his own free will desist from the completion of his horrid task ; but it not unfrequently forms a feature honourable, even in the enormity of crime, to human nature, that the murderer, appalled with horror at his own guilty purpose, suffers himself to be overcome by the kinder feelings of his nature, and leaves his work unfinished : this, no doubt, would occur more frequently were such encouragement held out to the offender ; since, under the present system, the criminal finds safety in the most effectual completion of his purpose, whereas in the other case he might hope, by a timely repentance, to escape the extreme penalty of the law.

No observations need at present be offered on the following section, which relates to the offence of administering drugs with intent to procure the miscarriage of women quick, or not quick, with child, as it is a simple re-enactment of the first two sections of 43 Geo. 3. c. 58. in a more concise form. By the fourth section of the same statute it was provided, that where a mother was indicted for the murder of her bastard child, the jury, if they acquitted the prisoner of the murder, might find that she was delivered of a bastard child and endeavoured to conceal its birth, the punishment of which offence was imprisonment for any term not exceeding two years. By the present act a woman may be indicted for the murder, and if acquitted of the murder, still found guilty under the same indictment for the concealment, or may be indicted at once for the concealment as a substantive offence and punished as heretofore. There was certainly an absurdity in indicting a person for murder, when the prosecutor might be well satisfied, from the evidence within his own reach, that the child had never been born alive ; it may be also observed that by the omission of the words " which, if born alive, would have been a bastard," married women may be indicted for the concealment of the birth of legitimate children, or found guilty thereof under an indictment for murder, whereas before a married woman, if acquitted of the murder, could not have been found guilty of the concealment.

With respect to bestiality, it will be quite sufficient to observe,

that by the substitution of the word "animal" for "beast," it is presumed the commission of an unnatural crime with a bird (one or two instances of which, it is believed, are known to have occurred) will henceforth be a capital offence. A very important alteration has been introduced, with regard to the proof of the completion of sodomy, bestiality, and rape, the reasons for which are stated in the act itself: "And whereas upon trials for the crimes of buggery, and of rape, and of carnally abusing girls under the respective ages<sup>1</sup> hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of these several crimes; for remedy thereof, be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only." There can be no doubt that the inconvenience complained of in the act, was frequently felt, from the necessity of proving emission as well as penetration; in all cases, except in rape, it was scarcely possible in any instance to prove the emission, and not always in rape; but we think that the legislature, (unless hereafter that is to be considered rape, which was not so formerly, and that such is not the case we are persuaded from the fact, that only the difficulty of the proof is noticed) might in prudence have added that the criminal must be proved to have effected his purpose—for otherwise, what line can be drawn between rape and an assault with intent to commit a rape? If the man was either interrupted in the act, or voluntarily desisted, the offence was not complete, but he was merely guilty of an assault; and there can be no doubt that men, who make attempts on the virtue of women, hoping that they will yield without resorting to extreme violence, oftener than not, desist, on finding the impossibility of *forcing* the woman's consent. Of the expediency of inflicting the severest punishment on such offenders, we say nothing; but we cannot but think this unqualified dispensation of the proof of

<sup>1</sup> Ten and twelve, the former of which, under any circumstances, is a capital felony; the latter, though with the consent of the girl, a misdemeanor.

emission, is somewhat ill-judged, if the same distinction, between rape and assault with intent to commit rape, is still to be adhered to. Under the old system, the smallest degree of penetration, coupled with proof of emission, constituted a rape, and it would have been a great improvement had proof of the smallest degree of penetration, when at the same time there was evidence that a man had completed his object, whether emission could be proved or not, been held sufficient for that purpose. It is a very easy matter for a woman to hash up a charge of rape, and a very difficult one to defeat such a charge, even when false; a woman by very intelligible advances, can invite a man to make an attempt on her virtue, and he, in hopes of acquiescence on her part, may enable the woman to swear to some trifling degree of penetration, and unless the old distinction shall still be adhered to in practice, may, actually against his own consent, be drawn into the commission of a capital felony by the very person that appears as his prosecutor.

Considerable alterations are introduced with regard to the forcible abduction of women, with a view to gain possession of their property. The statutes relating to this offence were 3 Hen. 7. c. 2., 39 Eliz. c. 9. and 1 Geo. 4. c. 115., under which, in order to make the offence complete, a marriage must have taken place, and both the abduction and the marriage must have been in England. By the present act, taking or detaining, from motives of lucre, any woman that has any interest, "whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is an heiress presumptive, or next of kin to any one having such interest," *with intent* to marry or defile her, or cause her to be married or defiled by any other person, will be felony, and punishable by transportation for life, or for any term not less than seven years, or by imprisonment with or without hard labour, for any term not exceeding four years. The unlawful abduction of any girl under the age of sixteen from her parents, or temporary guardian, will subject the offender on conviction to suffer such punishment by fine or imprisonment, as the court shall award; the only alteration made is in the degree of punishment, and was called for by the late aggravated case of *Rex v. Wakefield*; the punishment under 4th and 5th

Ph. & M. c. 8. s. 3. being only imprisonment for two years, or fine.

Stealing a child under ten years of age from its parent or guardian, which was made felony by 54 Geo. 3. c. 101. s. 1. is left precisely in the same state as before the passing of this act.

One or two very important alterations have been made with respect to bigamy: as the law formerly stood, a person whose consort had been abroad for seven years, though known to be living, might marry again with impunity, or if a divorce *a mensâ et thoro* only had taken place; the only exceptions under the present act are, where a person, being a subject of his Majesty, marries a second time, "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person, to be living within that time," or "who at the time of such second marriage shall have been divorced from the bond of the first marriage," or "where the former marriage shall have been declared void by the sentence of any court of competent jurisdiction, and every such offence may be dealt with, enquired of, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county."

The remainder of this statute relates principally to assaults on different persons, either privileged from their office, or to whom public policy makes it necessary to give special protection, and to convictions before magistrates, for offences mentioned in this act.

So far back as 50 Edw. 3. c. 5. (re-enacted by 1 R. 2. c. 15.) an act was passed, making a person who arrested a clergyman in a church or church-yard, while attending to divine service, liable to imprisonment and ransom at the king's will, and gree (that is to say, satisfaction) to the party arrested. It is obvious, that the object of these statutes was to deter persons from interfering with the decent and reverent performance of public religious duties; for it seems, that as a protection to the clergyman himself it was ineffectual, inasmuch as the arrest, if not made on a Sunday, was deemed good in law.<sup>1</sup>

<sup>1</sup> Wats. c. 34. 5 Burn's Just. *Public Worship*.



Considering, however, that witnesses or other persons attending to give evidence, or otherwise connected with a cause in a court of law, are privileged from arrest, whilst going to, attending, and returning from court; it would seem, by the modified protection granted to persons engaged in the particular service of God, compared with that granted to those engaged in promoting the administration of justice, that disrespect rather than reverence is shewn to that holy service. We believe that very few instances, except indeed during the heat of the rebellion, of arrests attempted upon clergymen, while engaged in the performance of divine service, have occurred; that, under the proposed law, instances of this offence will be more frequent in future there can be no doubt. It is enacted, "That if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment by fine and imprisonment, or by both, as the court shall award." We are of opinion, that it would have been better to have made an arrest under such circumstances void, and to have allowed the party arrested to be brought up by *habeas corpus* and discharged; still, however, making an arrest in the actual performance of divine service a misdemeanor, and subject to the above-mentioned punishment, and at the same time giving the injured party his remedy by action for the false imprisonment, as in ordinary cases of privilege from arrest.

The statute 9 Anne, c. 16., making it a capital felony to assault and strike, or wound a privy councillor in the execution of his office is re-enacted, and in addition every person counselling, aiding and abetting such offender, is to be deemed guilty of felony, and liable to the same punishment.

The eleventh section of the 26th Geo. 2. c. 19. subjecting any person who shall assault a magistrate, officer or other person lawfully authorised, on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, of any goods wrecked, stranded, &c., to transportation for seven years, is simply re-enacted, with the alternative of imprisonment, with or without hard labour, for such term as the court shall award, instead of transportation.

The next section, which in a very neat and concise form embodies, with some trifling addition, the clumsy provisions of 3 Geo. 4. c. 114.; and 1 & 2 Geo. 4. c. 88. s. 2., we shall quote at length. "And be it enacted, That where any person shall be charged with and convicted of any of the following offences as misdemeanors, that is to say, of any assault with intent to commit felony; any assault upon any peace-officer, or revenue-officer, in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the court may sentence the offender to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

We may notice, that the second section of the 33 Geo. 3. c. 67. subjecting any person who shall assault a ship-carpenter, with intent to prevent him from working, to twelve months' imprisonment, and, making the second offence felony, with transportation for fourteen or seven years, is repealed, and the offence made punishable, on summary conviction before two justices of the peace, with imprisonment and hard labour for any term not exceeding three calendar months.

We shall conclude this article by quoting three sections, which introduce a new and very important alteration in the administration of justice, with respect to assaults: he shall only remark, that it will be a great public benefit to banish from our courts of quarter sessions prosecutions for trifling assaults, in which the prosecutor is often as guilty as the defendant, though we cannot but think the price paid for that benefit is considerably more than it is worth, namely, in adding to the already exorbitant power exercised by justices of the peace; it is notorious that scarcely a fiftieth part of the assault cases that come before magistrates in their private houses, was ever brought before the court; in many the quarrel

was settled before the sessions ; in others, the magistrate bound over the offender to keep the peace, and dismissed the complaint ; and in those only where the intervention of a jury was absolutely requisite, or where the private resentment of the magistrate, or of an influential neighbour called for a public exposure, were the most extreme measures resorted to. As our object is to give information, and not criticism we shall make no apology for the length of our extracts. " And whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided, under the limitations hereinafter mentioned ; Be it therefore enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs (if ordered) the sum of five pounds, which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place, in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding or division, in which such parish, township, or place, shall be situate, whether the same shall or shall not contribute to such general rate ; and the evidence of any inhabitant of the county, riding, or division, shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby ; and if such fine as shall be awarded by the said justices, together with the costs (if ordered) shall not be paid, either immediately after the conviction or within such period as the said justices shall, at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, there to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid ; but if the justices, upon the hearing of any such case of assault or battery shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a

certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

“ And be it enacted, That if any person, against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

“ Provided always, and be it enacted, That in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act ; provided also, that nothing herein contained shall authorize any justices of the peace to hear and determine any complaint of assault or battery, which shall have been committed in asserting any title or claim to any goods or chattels, lands, tenements or hereditaments, or any interest therein or appertaining thereto.”

## DIGEST OF CASES.

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THE First (the common law) division of this Digest contains every case (except those which relate to real property) reported in each of the last numbers of the King's Bench and Common Pleas Reports—*Barnewall and Creswell*, *Manning and Ryland*, *Bingham, Moore and Payne*—with some MS. notes of recent decisions.

The Second (the real property) division includes every case referrible to that head, in the reports mentioned above, and, with very few exceptions, all on the same subject, in the two last numbers of *Russell*, the last numbers of *Simon and of Bligh*; and the most important decisions of the Court of King's Bench in Ireland, from *Batty's Reports*.

The Third (the equity) division includes the cases in the last numbers of *Russell*, *Simon, Young and Jarvis*, and the most important of the decisions in the House of Lords, from *Bligh*.

The Fourth (the bankruptcy) division includes every case in the last number of *Glynn and Jameson*.

For the sake of brevity we have adopted the abbreviations in general use; namely,

B. & C. *Barnewall and Creswell*.

Y. & J. *Younge and Jarvis*.

M. & R. *Manning and Ryland*.

G. & J. *Glynn and Jameson*,

M. & P. *Moore and Payne*.

&c. &c.

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## COMMON LAW.

### AGREEMENT.

1. An agreement "that A. should give B. 100*l.* for a coach, by four bills of 25*l.* each, and that B. should have a claim upon the coach until the debt was duly paid," (which agreement was followed up by mutual delivery of the coach and the bills,) was held to operate as a mere personal licence from A. to B. untransferable to take the coach if the bills were not paid, and that, the coach having come to the hands of the administratrix of A, by operation of law, B. was not justified in taking it on the ground of one of the bills not being paid.—*Howes v. Ball*, 7 B. & C. 421.
2. An action may be maintained for the non-performance of a contract for the sale of land which is found to be incumbered by an unsatisfied judgment, without a previous tender of a conveyance to the judgment creditor.—*Pearson v. Upwell*, MS. Easter Term, 1828.

### ATTORNEY.

1. A party who intrusts papers to an attorney, with an intimation that she would pay him if she recovered a certain property, is not liable for the costs of an action of ejectment commenced and abandoned by him.—*Tabram v. Horn*, 1 M. & R. 228.

2. An attorney who has been a member of a joint stock company, cannot recover against two other members the costs of defending an action brought against them in that character subsequent to the dissolution of the company.—*Milburn v. Codd*, 1 M. & R. 238. S. C. 7 B. & C. 419.
3. An attorney employed by the assignees of an insolvent to bring an action, cannot recover his costs incurred therein, without proving either that it was brought with the consent of the creditors and approbation of a commissioner, or that he had apprised his client that such consent was necessary.—*Alison, Gent. &c. v. Rayner*, 7 B. & C. 441.
4. The property in copies, drafts, &c. paid for by a client, is in him, and not in the attorney.—*Ex parte Horsfall*, 7 B. & C. 528.

#### AWARD

It may be stipulated in a deed of submission that the authority of the arbitrators shall continue, notwithstanding the death or insolvency of either of the parties; and the surety on a bond conditioned for the due performance, in which bond the stipulation as to death, &c. was not inserted, is liable, though the award was not made till after the death of the party for whom he was bound, and directed the executors to pay, &c. By the deed the award was to be made between —— and the —— day of —— next, or any other day the submission might be prorogated. Held that the omission of dates was immaterial, and that it was to be looked upon as a general authority to be exercised in a reasonable time.—*Macdougall v. Robertson*, 1 M. & P. 147. 4 Bing. 495.

#### BANKRUPT.

1. The assignees of a bankrupt cannot consider as a wrong doer a person interfering with the bankrupt's effects, after once treating such person as their agent.—*Brewer v. Sparrow*, 1 M. & R. 2. S. C. 7 B. & C. 310.
2. If a verdict in trover be obtained in vacation, and after the 1st day of the next the defendant becomes bankrupt, and final judgment is signed subsequently, the plaintiff may prove the debt thereby created under the commission, and will be barred by the certificate.—*Greenway v. Fisher*, 7 B. & C. 436.

#### BILL OF EXCHANGE.

- A power of attorney "for me and on my behalf to pay and accept such bills as shall be drawn or charged on me by my agents or correspondents, as occasion shall require," authorises the acceptance of such bills only as are drawn on the individual account of the principal and not bills drawn in respect of partnership transactions. A power to indorse and negotiate bills of exchange, payable to the principal, and generally "to perform all other affairs and concerns of the principal," does not authorise the acceptance of bills.—*Attwood v. Munnings*, 1 M. & R. 66. S. C. 7 B. & C. 278.
2. Where the drawer of a bill draws upon himself, it is to be looked upon as a promissory note, and the drawer is not entitled to notice of

non-acceptance. The similarity of name and residence is evidence sufficient to warrant the jury in supposing the drawer and drawee to be the same person.—*Roach v. Ostler*, 1 M. & R. 120.

3. The defendant had accepted a bill for the honour of A. the drawer, who indorsed it to his agent, the plaintiff, by whom it was paid away on the drawer's account for goods contracted for by him. This contract was afterwards rescinded, but the holder refused to re-deliver until repaid a demand upon a different account on the drawer. This the plaintiff promised to pay, received the bill, and sued the acceptor, but held that he could not recover even the amount for which he had thus rendered himself liable.—*Hallet v. Davis*, 1 M. & P. 79.
4. A bill of exchange payable 30 days *after sight* was presented for acceptance and refused, and duly protested eight days afterwards; it was accepted by a third person for the honour of the drawer; and at the expiration of 30 days from this acceptance, together with the days of grace, presented for payment both to the original drawees and the acceptor for honour; held that these presentments for payment were made at a proper time.—An acceptance for honour is not an absolute but a conditional acceptance, and therefore held 2ndly, that an averment of presentment to the drawee for payment was necessary.—*Williams v. Germaine*, 7 B. & C. 468.

#### COMMON.

An unqualified custom for the lord of the manor to inclose the waste is bad. Secus, a custom to inclose leaving a sufficiency of common, but it is on the lord to shew that a sufficiency is left. Semble, that a custom so qualified is good even as against common of turbary.—A commoner may throw down *the whole* of a fence inclosing any part of the common, and even when erected by the lord wrongfully.—*Arlett v. Ellis*, 7 B. & C. 340.

#### CONVICTION.

A conviction under 52 Geo. 3. c. 93. for using a dog and gun without a certificate, is not removable by certiorari, without an affidavit that the place where the offence was committed was not within the district of the convicting magistrate.—*The King v. Long*, 1 M. & R. 139.

#### CORPORATION.

Where in a charter of incorporation any power is given by a clause which enumerates the different component parts of the corporate body, the concurrence of a majority of each separate part is requisite, as for instance, when given to the mayor, aldermen, and capital burgesses. Secus, when given to the corporation collectively, and no distinction made between the different classes of which it consists.—*Rex v. Headly*, 7 B. & C. 496.

**COSTS.** See PRACTICE.

#### COVENANT.

Where a covenant goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is independent, and the plaintiff

need not aver performance of covenants on his part. As where A. covenanted with B. not to carry on a particular trade, and B. in consideration thereof covenanted to pay an annuity; it was held, that a breach of A.'s covenant was no defence to an action brought by A. against B. for non-payment of the annuity.—*Carpenter v. Cresswell*, 1 M. & P. 66. S. C. 4 Bing. 409.

### EJECTMENT.

1. In ejectment judgment having been given against the lessor of the plaintiff in C. P., which was reversed on error in K. B., the plaintiff in trespass for the expulsion and mesne profits may recover the costs of the reversal, though error be pending in the Lords.—*Nowell v. Roake*, 1 M. & R. 176. S. C. 7 B. & C. 404.

[N. B. The pendency of the writ of error in the Lords does not appear in the report in B. & C.]

2. Upon a demise for a certain period, with the privilege of using part of the premises after its expiration, ejectment may be maintained for the part of the premises to which the privilege does not extend immediately on the conclusion of the term.—*Doe dem. Waters v. Houghton*, 1 M. & R. 208.
3. When the person in possession is proved to have been presented simoniacally, the presentee of the crown, after institution and induction, may maintain ejectment and is not driven to a quare impedit; the church being void in law by the simony when he was inducted.—*Doe dem. Watson v. Fletcher*, MS. East. Term, 1828, in the King's Bench.

### EVIDENCE.

1. Plaintiff and defendant held under the same landlord, the plaintiff by parol, the defendant by lease. The action was brought to try the property in a lane, and it was held, that the lease not being produced, the landlord's evidence was admissible to prove that he let the lane to both, and that the plaintiff therefore had no exclusive property therein.—*Noye v. Reed*, 1 M. & R. 63.
2. Payment of interest is evidence of the principal sum being due, in reference to which the interest was paid. A note given for a deposit may be read as evidence of the terms of the deposit, though void under the stamp act.—*Sutton v. Toomer*, 1 M. & R. 125. S. C. 7 B. & C. 416.
3. In debt on an award, the execution of the submission by all the parties must be proved as averred in the declaration, though one be a married woman.—*Ferrer v. Owen*, 1 M. & R. 222. S. C. 7 B. & C. 427.
4. Where a prior stamped agreement was varied by a subsequent one, unstamped, and there were counts on both together, and on each separately, although the latter agreement could not be read in evidence to support the plaintiff's case, yet the court took notice that it affected the validity of the former.—*Reede v. Deere*, 7 B. & C. 261.
5. Strips of waste on the sides of a highway are presumed to belong to



the owner of the adjoining close. Where such owner is a copyholder the presumption is, that they are part of his tenement.—*Doe dem. Pring v. Pearsey*, 7 B. & C. 304.

6. The will produced was thirty years old; but the testator had died within that time. Held that the surviving witness need not be called.—An alteration in a man's circumstances is not to be presumed. And, therefore, where a man is proved to have been living a century ago, unmarried and childless, he may be presumed, in the absence of proof, to have lived and died so.—*Doe dem. Oldnall v. Wolley*, MS. Easter Term, 1828.

And see title BILL OF EXCHANGE, supra, (2).

### EXECUTION.

1. One who enters under an agreement for a lease, and pays the rent agreed upon, acquires such an interest as may be seised under a fi. fa.—*Doe dem. Westmoreland v. Smith*, 1 M. & R. 137.
2. Where assignees had, for several months, been in possession of the farm and stock of a bankrupt, and renewed part of the stock and brought in fresh of their own, and the sheriff under a fi. fa. at the suit of a judgment creditor of the bankrupt levied upon the whole, he was deemed a trespasser *prima facie*, and not entitled to an indemnity.—*Bernasconi v. Farebrother*, 7 B. & C. 379.

### FACTOR.

If a broker pledges the goods of his principal to one that has notice of the agency, the pawnee can acquire no more right, title, or interest, under the 6 G. 4. c. 95. s. 5., than the broker possessed at the time of the transfer. Therefore, where the right of the broker was merely to an indemnity against bills accepted on security of the goods, it was held that the principal having satisfied those bills, was entitled to the goods without paying the pawnee the sum for which they were pledged to him.—*Fletcher v. Heath and others*, 7 B. & C. 517.

### FALSE IMPRISONMENT.

A magistrate is liable to an action of trespass and false imprisonment for ordering a constable to take out of the room a person accused of maliciously hurting the dog of another, and bring him back again if the parties could not settle the matter, that he might proceed to commit him, the matter being settled, and no conviction taking place.—*Budget v. Coney*, 1 M. & R. 211.

### HIGHWAY.

1. Justices are not liable to an action for a distress under a conviction for not performing statute work on the highways, if they have jurisdiction by reason of the plaintiff's occupying lands within the parish, although claiming an exemption. The proper course would have been to show the exemption before the magistrates, and appeal to the sessions.—*Fawcett v. Foulis*, 1 M. & R. 102. S. C. 7 B. & C. 394.
2. Under the highway act, a magistrate cannot present a road on the information of any other surveyor than the surveyor of the district in which the road lies.—*The King v. Inhabitants of Fylengdales*, 1 M. & R. 176. S. C. 7 B. & C. 438.

3. Where a landowner permitted a road to be made through his estate for the use of the public, as to all purposes except that of carrying coals, and after the expiration of a year from the opening of the road erected a bar, and stopped coal carts from passing. Held that this, if a dedication at all, was a partial one only, and that suffering the road to be repaired by the surveyor of the highways, at the expence of the parish, did not amount to an abandonment of the restriction.—*Marquis of Stafford v. Coyney*, 7 B. & C. 257.

#### INCLOSURE.

If an inclosure act give the commissioners power to award land, in exchange for other land or for money paid, they may award land partly in exchange, and partly for money.—*Doe dem. Lord Suffield v. Preston*, 7 B. & C. 392.

#### INNKEEPER.

A traveller stopped at an inn in Nottingham, and directed part of his baggage to be placed in a certain room therein; the innkeeper's servant made no objection, but placed it there, whence it was afterwards stolen. The Chief Baron at Nottingham assizes held that the case of an innkeeper was analogous to that of a carrier, and that if he would limit his responsibility, he must give a special notice that he will not be liable if the baggage be disposed in any particular place or manner. On a motion for New Trial the Court of K. B. concurred with this opinion.—*Richmond v. Smith*, MS. Easter Term, 1828.

#### INSOLVENT.

1. The death of the insolvent between the assignment to the provisional assignee, and the assignment by him, does not affect the last.—*Willes v. Elliott*, 1 M. & P. 19. S. C. 4 Bing. 392.
2. A surety may arrest the grantor of an annuity for arrears become due subsequently to the discharge of the grantor under the insolvent act, and which the surety had been compelled to pay, though the grantee had proved the value of the annuity and the surety had received a dividend upon a sum which he had been compelled to pay before.—*Freeman v. Burgess*, 1 M. & P. 91. S. C. 4 Bing. 416.

#### INSURANCE.

1. Stranding, according to its legal signification, is, when a ship by accident is on the ground or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, and is injured thereby; and the underwriters are liable, though such stranding is occasioned by the negligence of the master or mariners.—*Bishop v. Pentland*, 7 B. & C. 219. S. C. 1 M. & R. 49.
2. Where a vessel at the commencement of her voyage, was so damaged as to render it advisable to take out her cargo and sell her, an abandonment of the freight is not necessary to make the underwriter liable on a policy for freight.—*Mount v. Harrison*, 1 M. & P. 14. S. C. 4 Bing. 388.

#### LANDLORD AND TENANT.

Under a covenant to pay the taxes charged, or thereafter to be charged

on premises, the value of which is subsequently increased by the erection of buildings with the landlord's consent, the landlord is liable only for the taxes calculated on the original value of the land at the time of the demise.—*Watson v. Home*, 1 M. & R. 191. S. C. 7 B. & C. 285.

#### **LIBEL.**

In an action for a libel the jury find that the libel imputed felony to the plaintiff, but that the defendant was not actuated by *express* malice, and gave a verdict for fifty pounds damages. This the court refused to disturb, though objected to, on the ground that the action was not maintainable without proof of malice. A communication as to the conduct of a preacher to a congregation about to elect to the ministry, reflecting severely on him, is privileged, if not unnecessarily repeated or circulated.—*Blackburn v. Blackburn*, 1 M. & P. 33. S. C. 4 Bing. 395.

#### **LIEN.**

The right of general lien, unless expressly contracted for, can result only from general and unbroken usage; if the point has been at all disputed, the right cannot be implied, though the claim has been admitted in a great majority of instances.—*Holderness v. Collison*, 7 B. & C. 212. S. C. 1 M. & R. 55.

#### **MONEY HAD AND RECEIVED.**

The defendant as administrator sold out stock, and by the consent of the legatees retained a sum of money for the purpose of repaying the plaintiff the expense he had incurred in burying the testator's widow. Held that the sum thus retained was recoverable as money had and received to plaintiff's use.—*Murt v. Morssard*, 1 M. & P. 9.

#### **OVERSEER.**

An overseer has not, by virtue of his office, any authority to borrow money.—*Leigh v. Taylor*, 7 B. & C. 491.

#### **PARTNER.**

A person is not liable for supplies furnished to a mine unless he has held himself out as a partner in the adventure to the person by whom the credit was given, or is really a partner. And the payment of money for a share and receipt of a certificate, are not sufficient to confer a legal interest, a mine being looked upon as real property; nor is it conclusive evidence of such actual partnership that the defendant considered himself a proprietor, and made inquiries about the management as such.—*Vico v. Anson*, 1 M. & R. 113. S. C. 7 B. & C. 409.

#### **PLEADING.**

1. A count for money had and received by defendant as executor, cannot be joined with a count on an account stated with defendant as such. Quære whether a count for money paid for the defendant as executor, may be so joined.—*Ashby v. Ashby*, 1 M. & R. 180. S. C. 7 B. & C. 444.
2. In an indictment for obstructing a highway, an averment that the obstruction took place in the parish of S., opposite to a mill there, in

- a highway there leading from S. to H. is a sufficient allegation that the highway is in the parish of S.—*The King v. Knight*, 1 M. & R. 217. S. C. 7 B. & C. 413.
3. A bill was specially intituled of the 20th of January, and then filed as of the preceding term. It was delivered on the same day, and the issue joined was, whether at the time of exhibiting the bill the plaintiff was administratrix. Administration was granted on a day in the vacation, anterior to the 20th of January. Held that the verdict was properly found in the affirmative.—*Wooldridge v. Bishop*, 7 B. & C. 409.
  4. Where an agreement was in these words, “The plaintiff having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, promise to pay thirty pounds on account of the debt, on the 1st of April.” Held, first, that it might be declared as an executory contract; 2ndly, that the consideration was sufficient, the agreement importing that the proceedings were, at least, to be stayed until the 1st of April. 3dly, that the naked averment that plaintiff did suspend proceedings was sufficient after verdict.—*Payne v. Wilson*, 7 B. & C. 423.
  5. Declaration stated, that defendant “*contriving, &c. did print and publish of and concerning the plaintiff, a libel, containing the false, &c., matter following, that is to say.*” It then set out the libel, which neither was connected with the plaintiff by any innuendo, nor manifestly appeared to relate to him. Held bad, on error.—*Clement v. Fisher*, 7 B. & C. 459.
  6. An indictment charged that A. B. on, &c. being the servant of J. H., on the same day and year aforesaid, &c. one ring, &c. then and there belonging to and in the possession of the said J. H. feloniously did steal. Held, that notwithstanding the introduction of the words on the same day and year aforesaid, the proper construction was, that A. B. was the servant of J. H. at the time of committing the theft.—*Rex v. Somerton*, 7 B. & C. 463.
  7. The court, in an action of assumpsit, will not grant leave to plead several special pleas to the effect that the money was due only upon stockjobbing differences, as this might be proved under the general issue. *Rosset v. King*, 1 M. & P. 145.
  8. The Court of King’s Bench held that an action was rightly brought against the owner of a carriage and horses, which had been hired with servants to drive them, for a journey to Ascot Heath races, in respect of an injury done by that carriage in the course of the journey. Lord Tenterden, C. J. and Littledale J. expressing their adherence to their opinions in *Sougher v. Painter*, 5 B. & C. 547.—*Smith v. Roberts*, MS. Easter Term, 1828.
  9. Case against a common carrier for the loss of a box by negligence. The *terminus à quo* was described to be Chester in the county of Chester. The evidence applied to the city of Chester, which is a county of itself, distinct from the county of Chester at large, but within its ambit. Variance immaterial. — *Woodward v. Booth*, 7 B. & C. 301.

## POOR RATE.

A canal company is liable to be rated in respect of the land which they occupy in every parish through which the canal passes, and for that value which the land there produces. Thus if the traffic on the canal is greater in one parish than another, the rate in that parish will be proportionably greater.—*The King v. Inhabitants of Kingswinford*, 7 B. & C. 236. S. C. 1 M. & R. 20.

## PRACTICE.

1. An Irish peer, who has voted at the election of representative peers, is privileged from arrest, and from being sued by *capias*.—*Coates v. Lord Hawarden*, 1 M. & R. 110. S. C. 7 B. & C. 388.
2. A party under terms of taking short notice of trial for the sittings after a non-issuable term, cannot procure the venue to be changed from Middlesex or London to another county upon the common affidavit, it can be changed only upon special grounds.—*Gitton v. Randall*, 1 M. & R. 142.
3. An office copy of an affidavit on debt, on which a bill of Middlesex was issued, will authorise the issuing of a bailable latitat.—*Baker v. Allan*, 1 M. & R. 232. S. C. 7 B. & C. 526.
4. By ruling the sheriff to bring in the body, plaintiff precludes himself from taking proceedings against the bail, until that rule has expired; and if, before that period, bail be put in and justified, it is sufficient, although more than four days after exception.—*Whittle v. Oldaker*, 7 B. & C. 478.
5. When there is a judge's order for delivery of particulars of plaintiff's demand, and to stay proceedings in the mean time, the defendant cannot sign judgment of *non-pros* on account of the particulars not being delivered. His course is to obtain an order for their delivery within a given time, and if the plaintiff fail therein, judgment may then be regularly signed.—*Burgess v. Swayne*, 7 B. & C. 485.
6. Where actual demand is essential to the perfecting of a cause of action, the affidavit of debt must allege it to have been made.—*Driver v. Hood*, 7 B. & C. 494.
7. Proceedings in a foreign attachment being removed by certiorari, bail in the superior court must be put in for all the defendants, or a procedendo will be granted.—*Keat v. Goldstein*, 7 B. & C. 525.
8. An affidavit entitled of the court of C. P., in the jurat of which, the person before whom it was sworn was not described as a commissioner, is insufficient, and the defect cannot be remedied by a supplementary affidavit.—*Howard v. Brown*, 1 M. & P. 22. S. C. 4 Bing. 393.
9. Where the plaintiff was named in the affidavit as C. E. G., and in the subsequent proceedings as C. G., omitting the second name, it was held that an exoneretur must be entered on the bail-piece; but that the defendant having omitted to apply in the first instance, and perfected bail, the proceedings could not be set aside for irregularity.—*Grindall v. Smith*, 1 M. & P. 24.
10. An action by an Irish joint stock company possessed of no fixed property in this country, may be stayed till security has been given

for the costs in case of failure.—*The Limerick Railway Company v. Frazer*, 1 M. & P. 23.

11. In *tort* against several defendants the misnomer of one abates the writ as to him alone, and it is irregular to pray judgment of the writ generally.—*Wade v. Stiff*, 1 M. & P. 26.
12. A *capias* being made returnable on a day certain, instead of on a general return day, the court refused to allow it to be amended, unless the plaintiff would consent to discharge the bail on defendant's entering a common appearance.—*Johnson v. Dobell*, 1 M. & P. 28.
13. A foreign master of a vessel, trading to this country, having no fixed residence here, cannot be required to give security for costs. The motion should be made before plea pleaded, unless upon an affidavit that the defendant was before ignorant of plaintiff's residing abroad.—*Kasten v. Plaw*, 1 M. & P. 30.
14. If a country cause be made a remanet, a new notice of trial is necessary, though not when made a remanet at the sittings in London or Middlesex.—*Gains v. Bilson*, 1 M. & P. 87. S. C. 4 Bing. 414.
15. A party outlawed can only appear in court for the purpose of reversing the outlawry. Thus, a grantor of an annuity, who has been outlawed in K. B. cannot apply to C. P. to set aside the securities whilst his outlawry continues.—*Loukes v. Holbeck*, 1 M. & P. 126. S. C. 4 Bing. 419.
16. The defendants, in an action in which the plaintiff had been nonsuited, and had obtained a rule for new trial, gave a cognovit for one shilling damages, and costs to be taxed by the Prothonotary. The Prothonotary having refused to tax the costs of the nonsuit, the court refused to interfere. *Elvin v. Drummond*, 1 M. & P. 88. S. C. 4 Bing. 415.
17. The defendant, an uncertificated bankrupt, when the action was commenced, pleaded his bankruptcy and certificate *puis darrien* continuance, on which the plaintiff withdrew the record, and countermanded the notice of trial. The plaintiff being afterwards ruled to reply, obtained an order for time, but subsequently determined to proceed no farther, when the defendant signed judgment of *non-pros*, and issued execution for costs, but held that defendant was not entitled to the costs of proceedings prior to the plea, and the execution was accordingly set aside without costs.—*Baker v. Morrey*, 1 M. & P. 138.
18. On a motion by bail to set aside an attachment against a sheriff, it is necessary that the affidavit should state that it was made, not only without collusion with the principal, but at the expense of the bail.—*King v. Sheriff of London*, 1 M. & P. 177. S. C. 4 Bing. 427.
19. Costs are never given upon showing cause against a rule in the first instance.—*Rex v. Lacy*, 1 M. & R. 139.
20. The proceedings in a recovery cannot be amended by substituting one county for another. — *Dolling v. Rice*, 1 M. & P. 178. S. C. 4 Bing. 426.

21. Security for costs when plaintiff resides abroad cannot be moved for on the mere putting in of bail nor until after justification, if they have been excepted to. See *De la Preuve v. Duc de Birs*, 4 T. R. 697.—*Johnson v. Ely*, MS. Easter Term, 1828.

#### PRESENTMENT.

If a high constable would present for a nuisance in a highway, he must go before the grand jury, and give his evidence upon oath.—*Rex v. the Bridgewater and Taunton Canal Company*, 7 B. & C. 514.

#### SEDUCTION.

A married woman is competent to enter into an engagement of service, defeasible only by her husband; and a father may maintain an action for the seduction *per quod*, &c. of his married daughter, serving in his family apart from her husband.—*Harper v. Luffkin*, 1 M. & R. 166. S. C. 7 B. & C. 387.

#### SETTLEMENT.

1. The mere fact of a pauper being first found in a particular parish, is not presumptive evidence of his having been born there, nor does his having being maintained for several years and afterwards occasionally relieved by such parish, amount to an admission of his being settled there, nor preclude the parish from disputing the point.—*The King v. the Inhabitants of Trowbridge*, 7 B. & C. 252. S. C. 1 M. & R. 7.
2. A pauper was hired as an ostler, upon an agreement that he was to have no wages, but merely what he got as ostler, and that the service might at any time be determined by either party; held that the latter stipulation precluded the presumption of its being a general hiring for a year, and that service under it did not confer a settlement.—*The King v. the Inhabitants of Great Bowden*, 7 B. & C. 249. S. C. 1 M. & R. 13.
3. A man marrying a woman who is tenant from year to year of premises under the annual value of 10*l.* gains a settlement thereby, whether her interest came to her as executrix or otherwise.—*The King v. Inhabitants of Ynyseynham*, 7 B. & C. 223. S. C. 1 M. & R. 16.
4. A pauper under age entered into a contract of service, and served under it till he had attained his majority, when he returned to his father's house: held that the pauper was not emancipated by such contract and service, and that his settlement followed that of his father, acquired during the continuance of the service.—*The King v. Inhabitants of Lykhet Matravers*, 7 B. & C. 226. S. C. 1 M. & R. 25.
5. A general hiring, with a stipulation that the servant might leave on giving a month's notice, and might be dismissed at pleasure, is a yearly hiring sufficient to confer a settlement, and it matters not though the hiring was by a public establishment, as a Royal Military College, exempt from poor rates.—*The King v. Inhabitants of Sandhurst*, 1 M. & R. 95.

#### SET-OFF.

The plaintiff having recovered damages against four defendants in trespass, three of whom were indemnified by the other, who had recovered against the present plaintiff in a former action; held that the damages and costs in the former action might be set off against the

damages and costs in the present.—*Bourne v. Bennett and others*, 1 M. & P. 141. S. C. 4 Bing. 423.

### SESSIONS.

The power given to the court of quarter sessions by the 3 Geo. 4. c. 46. to order the discharge of a forfeited recognizance, is confined to cases where the party has been committed or given security to appear; and the court does not possess a general discretion.—*Hayne v. Hayton*, 7 B. & C. 292.

### SHERIFF.

If a warrant of attorney be executed by one who is inaccurately described therein, and judgment entered up and a fi. fa. issued against him by that description, the sheriff is bound to execute the fi. fa. and cannot dispute the accuracy of the description.—*Reeves v. Stater*, 7 B. & C. 486.

### STAMPS.

1. An *ad valorem* stamp on the principal sum is sufficient for a bond conditioned for the payment of the principal sum, and interest for the performance of collateral acts, provided the *ad valorem* duty exceeds 1*l.* 15*s.* which would have been required by the collateral matter if it stood alone.—*Dearden v. Burns*, 1 M. & R. 130.
2. An agreement may be received as evidence of the tenancy without a fresh stamp, though altered by consent after execution, by the addition of the words "*house and premises*" to the word "*farm*."—*Doe dem. Waters v. Houghton*, 1 M. & R. 208.
3. When a clause in a prior is incorporated by words of reference into a subsequent agreement, it is not annexed thereto, so as to make an additional stamp necessary on the ground of its swelling such subsequent agreement beyond 1080 words.—*Atwood v. Small*, 7 B. & C. 390.
4. Articles whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of £600 to perform the agreement; held that a stamp of 1*l.* 15*s.* was sufficient.—*Mounsey v. Stephens*, 7 B. & C. 403.
5. To prove a tenancy the lessor of the plaintiff put in a written unstamped agreement to take the premises in question at 2*s.* 6*d.* per annum, to quit at half year's notice. The premises were proved to be actually worth five pounds per annum. It was objected that it ought to have been stamped. But Vaughan B. at Shrewsbury admitted it. And the Court of K. B. held this was right, that it came within the exception in 55 Geo. 3. c. 184., since the subject matter of the agreement being the mere right of occupation, and not the premises themselves, it did not amount to twenty pounds.—*Doe dem. Morgan v. Amiss*, MS. Easter Term, 1828.

### TRESPASS.

A remainder man, after entering upon a party in possession by intrusion, may maintain trespass against the intruders though he retains possession.—*Butcher v. Butcher*, 1 M. & R. 220. S. C. 7 B. & C. 399.



**TURNPIKE.**

Under the general turnpike act, 3 Geo. 4. c. 126. s. 86. authorizing the trustees, after the completion of a new road, to stop up the old one, *unless* leading to some church, mill, village, town or place, lands or tenements, to which the new road does not immediately lead; the trustees have a discretionary power of stopping up the old road even in the excepted cases.—*De Beauvoir v. Welch*, 1 M. & R. 81. S. C. 7 B. & C. 266.

**VARIANCE.**—See PLEADING, 9.

**USURY.**

1. An agreement for the payment of the purchase money of an estate by instalments, with interest beyond the legal rate, is not usurious if the sum stipulated for as interest is in fact a part of the purchase money.—*Beete v. Bidgood*, 1 M. & R. 143. S. C. 7 B. & C. 453.
2. Where a judge leaves it to the jury to draw their own conclusion on a question of usury, their verdict cannot be disturbed on account of an erroneous opinion upon the matter of fact, expressed by the judge.—*Solarte v. Melville*, 1 M. & R. 198. S. C. 7 B. & C. 430.

**REAL PROPERTY, AND CONVEYANCING.****ADVOWSON.**

1. Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, the right accruing by the vacancy is a distinct independent chattel, and devolves on the personal representative, who may therefore present for that turn.—*Rennell v. Bishop of Lincoln*, 7 B. & C. 113. Dissentient. Lord Tenterden, C. J.
2. Where the advowson of a parish is vested in trustees for the benefit of the parishioners, the election of the vicar must be by voting openly, but the right of voting may by long usage be confined to parishioners who pay church and poor's rates. *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.

**CONDITION.**

The doctrine of equity, with respect to conditions precedent in wills, is, that they must be complied with strictly when the property is given over on the devisee's failing to perform them; but the court will interfere, and set up the prior gift when there is no devise over, if the parties can be placed in the same situation, as if the condition had been strictly performed. 1 Russ. 608. Thus when lands were devised in fee, with a direction that the debts due to testator from the devisee's husband should be released, on condition that within two months from the testator's death, the devisee's husband should release all claim to the lands devised, it was held that the husband should

not lose the benefit intended him, from his not executing the release within the prescribed period.—*Hollinrake v. Lister*, *ibid.* 500.

CONSIDERATION.—See CONVEYANCE.

### CONVEYANCE.

1. Though a deed is expressed to be made for natural love, it may be proved to have been made in consideration of marriage, because the real is consistent with the alleged consideration.—*Tanner v. Byne*, 1 Simons, 160.
2. A reversion lies in grant, and though the particular estate is only from year to year, and the lands are described as in the grantor's possession, it will pass without attornment, livery, or enrolment.—*Doe dem. Were v. Cole*, 7 B. & C. 243. 1 M. & R. 33.
3. Recitals in a conveyance, whatever effect they may have against the parties to it, cannot be evidence as against third persons.—1 Russ. 604.

CORPORATION.—See TRUSTEE.

COVENANT.—And see LANDLORD AND TENANT.

Where a person in remainder in tail under a former settlement, covenanted that in case she should become entitled to a certain estate under the limitations of a former settlement, such estate should be conveyed as therein mentioned; and her brother, the antecedent tenant in tail, suffered a recovery, and died without issue, whereby the fee gained by such recovery descended on her; it was held that she took it not under or by virtue of the limitations of the settlement, but by immediate descent from her brother, and was consequently not bound to convey it under the covenant.—*Tayleur v. Dickenson*, 1 Russ. 521.

DEED.—And see CONVEYANCE; COVENANT.

Loss of a deed or instrument is a ground on which the court of chancery will exercise jurisdiction, but with great caution.—Per Lord Chancellor in *Barker v. Ray*, 2 Russ. 73, 4.

DEVISE, ESTATE IN FEE OR FOR LIFE.

Words will not carry a fee, only because they would otherwise be mere surplusage; and in their ordinary sense the words '*possessed of*' do not import real estate. Where, therefore, a testatrix, after giving pecuniary legacies, devised to A. B. her two fields at, &c., likewise the remainder of the personalty, and *all she might die possessed of* at the time of her death, after the above bequests were discharged, &c.; the devisee was held to take only an estate for life.<sup>1</sup> *Monk v. Mawdsley*, 1 Simons, 286.

DEVISE.—ESTATE TAIL.

1. The word '*leave*' has not, in devises of real estate, the effect of confining

<sup>1</sup> The devisor was a feme covert, and the will the execution of a power; but it appears from the reasoning of the court that the case may be stated generally in reference to the above point.—*Vid. ibid.* 289, 290, 291.

the word 'issue' to issue living at the time of testator's death. When, therefore, the devise was to the use of R. C. for life, and after his decease, to the use of his issue male or female, in such proportion or proportions as he should think proper to devise the same, with power to charge the lands with a jointure, but in case he *should die leaving no issue*, then with remainders over; R. C. was held to take an estate tail.—*Croly v. Croly*, 1 Batty, 1.

2. Lands were devised to W. "during the term of his natural life, and in case he has issue, then it is my will they shall jointly inherit the same after my decease." In a subsequent part of the will, testator gave the residue of his *effects real and personal* to the said W.; but *in case he dies without issue*, then, &c. W. died without issue. Held that the words in the first clause, if taken alone, would have given W. an estate for life; and if he had had issues, they would have taken jointly, but that as W. died without issue, the construction turned upon the subsequent devise, and he took an estate tail in the freehold, and the absolute interest in the personality.—*Ward v. Bevil*, 1 Y. & J. 512.

#### DEVISE—TO TRUSTEES, WHETHER THEY TAKE A CHATTEL INTEREST OR A FEE.

1. If lands are devised to trustees to do something for a given purpose, when that purpose is at an end, the estate ceases. Hence, where lands were devised to a trustee in trust to receive the profits, &c. thereof, for the purpose of maintaining, &c. the testator's son till 21, the trustee was held to take only a chattel interest.—*Morrant and wife v. Gough and another*, 1 M. & R. 41. S. C. 7 B. & C. 206. [Note—that the other circumstances of the case were immaterial to the construction of this devise. See 1 M. & R. 47. 7 B. & C. 211.]
2. If the obligor of a bond *without penalty*, conditioned for the payment of an annuity, devise as aforesaid, then, inasmuch as the bond does not create a debt in law, the devisee in trust is only liable for the profits which accrue during the continuance of his interest as to such arrears of the annuity as grow due after the testator's death. S. C. *ibid*.

And see CONDITION.

EQUITY.—See LANDLORD AND TENANT.

#### EXECUTORY LIMITATIONS.

Limitations by way of devise, or shifting, or springing use, may be made to depend on *an absolute term* of 21 years after lives in being. By the Vice Chancellor in *Bengough v. Edridge*, 1 Simons, 267. Where, therefore, trusts were to be performed after the expiration of a term in gross of twenty years, from the decease of the survivor of twenty-eight persons who were living at the testator's decease; they were held valid. S. C. *ibid*. 173.

FEE-FARM.—See RENT.

#### HUSBAND AND WIFE.

If a woman executes a settlement in contemplation of marriage, and

conceals it from her intended husband, it cannot stand against his marital rights, and the greater or less interval between the date of the instrument and that of the marriage, though a material circumstance, does not alter the principle. Held by the Master of the Rolls in *Goddard v. Snow*, 1 Russ. 485. when the interval was 10 months. But note, that in most of the cases, the period has been much shorter.

### INSOLVENT DEBTOR.

The insolvent debtor is no party to the ultimate assignment, and the ultimate assignee takes all the estate of the provisional assignee, notwithstanding the insolvent's death in the mean time, and before the hearing of his petition or passing of his examination. *Willis v. Elliot*, 1 M. & P. 19.

INSURANCE. See LANDLORD AND TENANT.

### LANDLORD AND TENANT.

1. It seems that in equity, as well as at law, a tenant who covenants to pay rent during the whole continuance of his lease, is not in the case of an accident by fire, entitled to a suspension of the rent during such time as is occupied in the rebuilding the premises. By the Vice Chancellor in *Leeds v. Cheesham*, 1 Sim. 146.
2. If a landlord, subsequently to the lease, insures the demised premises from accidents by fire, and the lease has no exception in respect of them, the tenant cannot compel the landlord to expend the money he receives from the insurance office, in restoring any buildings which may be burnt. *Ibid.*

OCCUPIER. See TITHES.

PEW. See PRESCRIPTION.

PREBENDARY. See ADVOWSON.

### PRESCRIPTION.

A pew in the body of a church may be prescribed for as appurtenant to a house out of the parish.—*Louseley v. Hayward*, 1 Y. & J. 583. [Note.—The court denied the distinction as to this point between the body and an aisle of the church.]

PRESUMPTION.—And see TERM.

Questions of limitation of time and presumption of surrender, are peculiarly questions for a court of law. By the Lord Chancellor, in *Lopdell v. Creagh*, 1 Bligh, 271.

RECITALS.—See CONVEYANCE.

### RECOVERY, COMMON.

1. The statute 24 G. 2. c. 48. s. 8., which requires that there shall be four returns inclusive, between the first and second writ of summons to warrant against the vouchers in common recoveries, was merely directory, and such returns may be abridged when the justice of the case demands it. *Still demandant, Raymond tenant*, 1 M. & P. 136.
2. The court will not amend a recovery by substituting the name of one county for that of another, though the mistake is sworn to.—*Dolling demandant, Rice tenant, Euston vouchee*. 1 M. & P. 178.

**RENT.**

If a fee farm rent is chargeable on the whole of a city, he who is entitled to the rent may demand the whole or any part of it from any one who has a part of or in that city; leaving the person who is thus called upon to pay, to obtain contributions from the other inhabitants as he best can. By Lord Eldon, in *Attorney General v. Corporation of Exeter*, 2 Russ. 53.

**REVERSION.**—See CONVEYANCE.

**SETTLEMENT.**—See COVENANT; EXECUTORY LIMITATIONS; HUSBAND AND WIFE; TRUSTEE.

**SHIFTING AND SPRINGING USE.**—See EXECUTORY LIMITATIONS.

**TENANT.**—See LANDLORD AND TENANT.

**TERM.**

A mortgage term was recited in a deed dated 1758, to have been created several years before, and to have been then assigned in trust to attend the inheritance; but there had been a clear possession for 60 years without reference to the term, and neither the deed creating it, nor the assignment of it was produced. The court held, that after the expiration of 70 years, without payment of interest, it should, on the authority of *Doe v. Hilder*, 1 B. & A. 782. presume the term to be surrendered.—*Townsend v. Champernown*, 1 Y. & J. 538.

**TITHES.**

1. Neither mortgagees, nor persons entitled to tithes, under terms for raising portions or charges, have a right to call for past rents and profits. Hence, the enjoyment of the tithes by the person who is tenant in fee, or tenant for life, subject to such charges, gives him a sufficient title to sustain a suit against occupiers on account of tithes.—*Cherry v. Legh*, 1 Bligh, 306.
2. If the occupier shows a colour of title to the tithes not rendered, a court of equity will not interfere, but leave the plaintiff to his legal remedy. *Ibid*.

**TRUST.**—See EXECUTORY LIMITATIONS; TERM.

**TRUSTEE.**

1. Where a devisee in trust for sale (such trust working a conversion) did not execute a conveyance made sixty years back, and purporting to be made by him and the parties beneficially interested; and possession had, since that period, gone under that conveyance, the title was held unobjectionable.—*Townsend v. Champernown*, 1 Y. & J. 538.
2. Where trustees lent money to a postnuptial settlor, which was secured by a subsequent mortgage; but the money was, in fact, never paid to the trustees on the trusts of the settlements; they were, nevertheless, held to be constituted specialty creditors by the mortgage.—*Turner v. Byne*, 1 Simons, 160.
3. When trustees are directed to keep down the interest, and out of

trust funds to pay off the principal, of incumbrances, the *cestuique* trusts under the deed may complain in a court of equity, that the funds, being available for, were not applied to that purpose, and that the interest of them is therefore unnecessarily continued. — Per Lord Redesdale, 1 Bligh, 339.

4. Where a corporation is in possession of funds arising from rates granted to them by act of parliament, and to be appropriated to certain beneficial purposes, they are, it seems, trustees; but at all events, they are accountable persons, and the circumstance of the act having provided that they shall furnish parliament with an annual account of the sums which they receive, does not oust the jurisdiction of the court of chancery, which, in such a case, can only be taken away expressly, or by necessary implication.—[S. C.] *Attorney-General v. Mayor, &c. of Dublin*, 1 Bligh, 312.

#### VENDOR AND PURCHASER.

1. When an estate subject to, is sold free from, incumbrances, they are matter of conveyance only, though their amount exceeds the purchase money.—*Townsend v. Champernoun*, 1 Y. & J. 449.
2. A purchaser, it seems, is not bound to rely on the recitals in deeds, though more than thirty years old, as evidence of a pedigree, which is unsupported by other proof, or by possession accordingly.—*Fort v. Clarke*, 1 Russ. 601.
3. If a personal representative, in whom, as such, a leasehold has vested, sells it, not in his proper character, or in the course of administering the assets, and the purchaser is aware of the nature of the transaction, it is assets unadministered, and the administrator *de bonis non* of the original testator is entitled to have the sale set aside.—*Cubidge v. Boatwright*, 1 Russ. 549.

VOUCHER.—See RECOVERY.

USE.—See EXECUTORY LIMITATIONS.

#### WARREN.

The right of warren ought not to be extended by inference to animals not clearly within it. Hence it was held that grouse are not birds of warren.—*Duke of Devonshire v. Lodge*, 7 B. & C. 36.

WILL.—See DEVISE.

#### WILL, REVOCATION OF.

An instrument void as a conveyance, does not revoke a prior will. Where therefore a wife having a power of appointment by will, duly executed that power, and afterwards joined with her husband in a deed, purporting to be an appointment of the same lands, but which was a nullity as to the wife, it was held that the will made in pursuance of the power, was not revoked.—*Eilbeck v. Wood*, 1 Russ. 564.

WORDS.—See DEVISE.

WRIT.—See RECOVERY.

## EQUITY.

## ADEMPTION.

A testator bequeaths his interest in two policies of insurance on the life of his wife to his executors, upon trust, after his wife's decease, out of the amount to be received upon them, to provide for certain legacies. His wife having died, he received the money, and invested it in securities of which he died possessed; held that the legacies failed.

—*Barker v. Rayner*, 2 Russ. 122.

## ANNUITY.

Assignment of 150*l.* part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.* is a grant of an annuity, and must be memorialized.—*Charretie v. Vause*, 1 Sim. 153.

## APPEAL.

1. An appeal from the Master of the Rolls or Vice Chancellor to the Lord Chancellor is only a re-hearing; evidence may therefore be read which was not read at the original hearing.—*Williams v. Goodchild*, 2 Russ. 91.
2. The taking of an account will not be stayed pending an appeal; nor does the court generally direct security to be given for the result of an account.—*Nerot v. Burnand*, 2 Russ. 56.
3. Pending an appeal, the court will sometimes stay the sale of property which the decree has directed to be sold; the appellant giving security for its value.—*Ibid.*

## ARBITRATION.

Before the award, either party may revoke the authority of the arbitrator, although the reference is made under an order of the court; but it is a contempt to do so.—*Hagget v. Welsh*, 1 Sim. 134.

## CERTIORARI.

It is sufficient for granting a writ of certiorari, to remove proceedings in replevin from a court of great sessions in Wales, that the title of the freehold is in question.—*Edwards v. Bowen*, 2 Russ. 153.

## CHARITIES.

1. It has not been decided from what period a corporate body shall be obliged to account in matters of trust. Where a corporation put in their answer in 1811, and in it had rendered accounts which went back as far as 1791, the account of the charity property was decreed from that time.—*Attorney General v. the Corporation of Stafford*, 1 Russ. 547.
2. The statute of Elizabeth created no new law on the subject of charitable uses; but only a new and ancillary jurisdiction.—By Lord Redesdale in *Att. Gen. v. Mayor, &c. of Dublin*, 1 Bligh, 347.
3. It is not a general rule of equity that a charitable gift for the benefit of the poor is to be confined to such poor as do not receive parish relief.—*Attorney General v. Corporation of Exeter*, 2 Russ. 45.

4. The Court is strict with the trustees when there is a wilful misapplication ; but not when mistake only.—S. C.
5. And it is reluctant to compel the corporation to make a discovery of property applicable to general corporate purposes.—S. C.
6. When trustees of a charity, under an instrument of doubtful construction, have acted honestly, though erroneously, they will not be charged in respect of past misapplication of the funds.—S. C.

#### COSTS.

1. Costs as between solicitor and client, allowed to the Archbishop and Bishop, when made parties to a suit respecting the validity of the election of a Vicar. — *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.
2. The court will not make an order to stay proceedings, until security be given for costs, upon the ground of the plaintiff being about to leave the country.—*Willis v. Garbutt*, 1 Y. & J. 511.

#### EXCEPTIONS.

Where exceptions are taken to the answers to the original, and also the amended bill, a separate rule for arguing each set of exceptions must be given.—*Eastwood v. Dobree*, 1 Y. & J. 508.

#### EXECUTOR.

Stock, like all other personal estate, is assets in the hands of the executor, and though specifically bequeathed, it vests in him, and till his assent a specific legatee thereof has no right to the legacy, nor can the bank prevent the executor from transferring the stock.—*Franklin v. Bank of England*, 1 Russ. 575. The Bank have appealed.

#### FEME COVERTE.

Where, after marriage, the husband of a woman entitled to a fund in a cause, agreed, in writing, to settle half his wife's property upon her : held, that the agreement enured to the benefit of the children, and that, therefore, the wife could not wave it.—*Fenner v. Taylor*, 1 Sim. 169.

#### INJUNCTION.

Injunction granted *ex parte* to restrain the owner of a house from making any erections or improvements, so as to obstruct the ancient lights of an adjoining house.—*Back v. Stacy*, 2 Russ. 121.

#### ISSUES.

1. New trial of an issue not granted merely because evidence was rejected which ought to have been received.—*Barker v. Ray*, 2 Russ. 63.
2. Nor because the judge represented the effect of the defendant's answer to the jury inaccurately.—*Ibid.*

#### JURISDICTION.

The court has jurisdiction to control the legal rights of a father over his children on the ground of his immoral conduct.—*Wellesley v. Duke of Beaufort*, 2 Russ. 1.

#### LANDLORD AND TENANT.

A tenant has no equity to compel his landlord to expend money received from a fire-insurance office in rebuilding the demised premises ; or



to restrain him from suing for rent until the premises are rebuilt.—*Leeds v. Cheetham*, 1 Sim. 146.

### MORTGAGE.

1. It is now an unquestioned rule of equity, that an equitable incumbrancer who will take possession, may have a receiver: care being taken that the order for the receiver shall not prevent any who have a better title to the possession, from ousting him if they please. In *Tanfield v. Irvine*, 2 Russ. 161, per Lord Chancellor.
2. The rights of an equitable mortgage are not taken away by the mortgagor's not having appeared to the suit, and being out of the jurisdiction of the court. S. C. 149.
3. The court will direct annual rests, as well in an account of occupation rent, as in an account of rents and profits received; and it may direct such rests against a mortgagee in possession, from the time at which the mortgage money was discharged, though there has been no direction to that effect in the prior orders under which those accounts were taken, if it was not then known that the mortgage debt was paid off. *Wilson v. Metcalfe*, 1 Russ. 530.

And see TITHES.

### MOTION.

Where a party shows upon affidavit, that a cause, which he did not know to be in the paper, was disposed of in his absence, the court will restore it to be heard *upon motion*.—*Rowley v. Carter*, 1 Y. & J. 511.

### PARTNERSHIP.

Where a partner has a right to appoint a person to succeed, upon his death, to his share of the business; the refusal of his appointee to come in on the same terms on which he was a partner, dissolves the partnership; but the dissolution is not wrought by the exclusion of the appointee.—*Kershaw v. Mathews*, 2 Russ. 62.

### PLEADING.

On an action to recover the produce of foreign specie remitted to an agent, the agent filed his bill, alleging generally, that there were mutual dealings between the parties, and praying an account and injunction: demurrer allowed.—*Frietas v. Dos Santos*, 1 Y. & J. 575.

### PRACTICE.

1. After an appeal was lodged in the house of lords, the court below made an order, expunging from the registrar's notes, a part of the evidence read upon the hearing: order reversed as irregular.—*Lopdell v. Creagh*, 1 Bligh, 255.
2. Answer taken off the file, because, (*inter alia*) in the *jurat*, as to one defendant, a mistake had been made in the year (1817 being written for 1827); and the answer had been affirmed by another defendant, a quaker, under a commission to take his answer upon oath.—*Parke v. Christy*, 1 Y. & J. 533.
3. On a bill by underwriters for a commission to examine witnesses abroad; the court held an affidavit of the plaintiff's solicitor, stating generally, that he believed the plaintiffs had witnesses abroad whose

testimony was material, without stating the grounds of his belief, to be sufficient.—*Robinson v. Somes*, 1 Y. & J. 578.

4. Where exceptions were taken to a return by the commissioners under a decree of partition, the court held that exceptions would not lie; and that a motion to suppress the return was the proper course.—*Jones v. Totty*, 1 Sim. 136.
5. The vendor, under a decree, may confirm an order nisi obtained by the purchaser, if the latter neglect to do so.—*Chillingworth v. Chillingworth*, 1 Sim. 291.
6. Office copies of depositions in a tithe suit in the exchequer may be read in a similar suit in the court of chancery against another defendant making the same defence, on producing office copies of the bill and answer in the former suit, without an order for that purpose.—*Williams v. Broadhead*, 1 Sim. 151.

#### RECEIVER.

Where the grantor of an annuity, secured on lands subject to a prior charge, resides abroad, but by his agent continues in the receipt of the profits; the court will, on the application of the annuitant, appoint a receiver, though the grantor has not appeared to the suit.—*Tanfield v. Irvine*, 2 Russ. 149. And see MORTGAGE.

#### SPECIALTY CREDITOR.

1. An annuity to the grantor's sister, though expressed to be made for natural love and affection, may be averred to have been in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor.—*Tanner v. Byne*, 1 Sim. 160.
2. A husband made a post-nuptial settlement of £4000, and then, in consideration of the £4000 expressed to have been lent to him by the trustees, mortgaged to them a real estate to secure that sum, and covenanted to repay it. Held, that although the husband never paid the money to the trustees, they were, nevertheless, specialty creditors of the husband,—*Tanner v. Byne*, 1 Sim. 160.

#### SOLICITOR.

Where a solicitor retained a sum of money, paid out of court, towards his costs; and upon taxation it appeared that at the time he obtained the money, he had been already overpaid; the court refused upon a motion for that purpose to charge him with interest.—*Wright v. Southwood*, 1 Y. & J. 527.

#### TIMBER.

Tenant for life without impeachment of waste, except as to timber growing in the park, avenues, demesne lands, and woods, adjoining the capital messuage, there being no woods of that description, cannot cut timber in any woods so adjoining the house as to serve for ornament or shelter to it.—*Newdigate v. Newdigate*, 1 Sim. 131.

#### VICAR.

1. Where an advowson is vested in trustees for the benefit of the parishioners an election of a vicar by ballot is not valid.—*Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.
2. In such a case, the right of voting at the election of a vicar may be

limited by long usage to the parishioners who pay church and poor's rates.—*Idid*.

## BANKRUPTCY.

### AFFIDAVIT.

Mode of proceeding on an irrelevant or scandalous affidavit.—*Ex parte Chisman*, 2 G. & J. 315.

### ALLOWANCE.

1. Bankrupt not entitled to allowance unless a sufficient dividend be paid both upon the joint and separate estate.—*Ex parte Goodall*, 2 G. & J. 281.
2. A bankrupt has no right to his allowance, until his certificate has been confirmed by the chancellor.—*Ex parte Pavey*, 2 G. & J. 358.

### ANNUITY.

A covenant by a husband to secure to his wife, if she should survive, an annuity, is a sufficient consideration to support a grant of an annuity from the wife's father.—*Ex parte Draycott*, 2 G. & J. 283.

### ASSIGNEES.

Where a bill has been filed before the bankruptcy of the plaintiff, a supplemental bill may be filed by the assignees without the consent of the creditors.—*Beavan v. Lewis*, 2 G. & J. 245.

### ATTESTATION.

A petition which does not on the face of it appear to be by a solicitor, must be properly attested. *Ex parte Cole*, 2 G. & J. 269.

### BANKRUPT.

1. A bankrupt cannot, after certificate, petition to supersede because he was not a trader.—*Ex parte Lewis*, 2 G. & J. 208.
2. A bankrupt who is disputing the commission at law cannot, because nonsuited, be compelled to convey.—*Ex parte Thomas*, 2 G. & J. 278.
3. Where a bankrupt acquiesces, the chancellor will, upon petition, restrain him from proceeding at law to impeach the validity of the commission.—*Ex parte Leigh*, 2 G. & J. 392.—Vide *Ex parte Glossop*, 2 G. & J. 268.

### CERTIFICATE.

1. A certificate signed by creditors before the bankrupt has passed his last examination is invalid.—*Ex parte Cusse*, 2 G. & J. 327.
2. Where a bankrupt lost 40*l.* on a wager, although he, on the same day, won more than that sum, his certificate was stayed on petition.—*Ex parte Newman*, 2 G. & J. 329.

### COMMISSIONERS.

Commissioners may expunge the debt of the petitioning creditor if improperly proved.—*Ex parte Neale*, 2 G. & J. 308.

### COMMITMENT.

1. Where a bankrupt is committed without a protection, the assignee may lodge a detainer against him, between the time of his applying to be examined and his examination.—*Ex parte Weight*, 2 G. & J. 202.
2. A warrant stating that various questions had been proposed to the bankrupt, "and amongst others the following," &c., is defective.—*Lawrence's Case*, 2 G. & J. 209.

3. A warrant referring to documents not set forth, so that the judge has not the same information which the commissioners possessed, is defective.—*Price's Case*, 2 G. & J. 211.
4. The omission of a previous examination does not vitiate a commitment upon a distinct ground.—*Atkinson's Case*, 2 G. & J. 218.

## COSTS.

The costs of a petition for his certificate, presented by a bankrupt after the petition day, will not be allowed.—*Ex parte Birch*, 2 G. & J. 206.

## DESCRIPTION.

1. A commission omitting to describe the bankrupt as of the place at which he had been chiefly known as a trader is bad.—*Ex parte Parrey*, 2 G. & J. 225.
2. He must be described as of the place where he actually traded.—*Ex parte Beadles*, 2 G. & J. 243.

## ELECTION.

1. A creditor may prove on a bill for part of the debt, and proceed at law for a bill for the remainder, which he had negotiated before the bankruptcy, and taken up after the proof.—*Ex parte Sly*, 2 G. & J. 163.
2. A creditor having proved will be restrained from issuing execution against the property in the hands of the assignees.—*Ex parte Bernasconi*, 2 G. & J. 381.
3. A creditor cannot proceed at law upon one of two bills for goods, due and dishonoured before proof on the other, but returned after proof.—*Ex parte Schlesinger*, 2 G. & J. 392.

## EQUITABLE MORTGAGE.

1. An equitable mortgagee is entitled to the rents and profits from the time of presenting his petition for a sale.—*Ex parte Bignold*, 2 G. & J. 273. But see *Ex parte Alexander*, 2 G. & J. 275.

## EVIDENCE.

It is not necessary to put in the proceedings as evidence where there is no notice to dispute the commission.—*Beavan v. Lewis*, 2 G. & J. 245.

## GUARANTEE.

A partner may give a guarantee for his partners in a matter relating to the partnership.—*Ex parte Nolte*, 2 G. & J. 295.

## INTEREST.

A separate creditor is not entitled to interest out of the surplus until the joint creditors have been paid in full.—*Ex parte Minchin*, 2 G. & J. 287.

## JUDGMENT BY NIL DICIT.

Bill does not lie to set aside a judgment by *nil dicat*: the remedy is by petition.—*Mitchell v. Knott*, 2 G. & J. 293.

## JURISDICTION.

1. Whether the chancellor has jurisdiction to enforce payment from the petitioning creditor of a forfeiture for compounding with the bankrupt. See *Ex parte Dimmock* & *Ex parte Marshall*, 2 G. & J. 262—265.
2. The court has no jurisdiction against an execution creditor who not proved.—*Ex parte Botcherly*, 2 G. & J. 367.
3. The vice-chancellor cannot, without consent, advance a petition to

be heard before the day for hearing fixed by the lord chancellor.—*Ex parte Charlton*, 2 G. & J. 390.

#### LIEN.

Where a London banker and a country banker became bankrupt, and the former was in possession of short bills and a mortgage, deposited with him as security against his acceptances, of such of which as were outstanding, the assignees of the country banker did not relieve his estate: held, that the holders of such acceptances were entitled to have the proceeds of the bills and mortgage applied, in preference, to the liquidation of their demands.—*Ex parte Waring*, 2 G. & J. 403.

#### PARTNERSHIP.

1. Where different firms are engaged in a join adventure, the creditors, in respect of the adventure, may prove against the joint estates of the minor partnerships.—*Ex parte Nolte*, 2 G. & J. 295.
2. A solvent partner cannot prove against the separate estate of his co-partners, upon indemnifying the joint estate against partnership debts.—*Ex parte Moore*, 2 G. & J. 166.
3. He cannot prove until all the joint debts are paid.—*Ex parte Ellis*, 2 G. & J. 312.

#### PETITIONING CREDITOR.

1. Where a bankrupt's assets are greater than his debts, and the creditors who have proved consent to the supersedeas, the petitioning creditor may receive his debt in full, without subjecting himself to the penalty for compounding under 6 Geo. 4. c. 16. s. 8. *Ex parte Smith*, 2 G. & J. 291.
2. The deposition of the petitioning creditor, at the opening of the commission, does not entitle him to vote in the choice of assignees.—*Ex parte Rawson*, 2 G. & J. 353.

#### PRACTICE.

1. A petition in bankruptcy is not vitiated by being entitled "In Chancery."—*Ex parte Hudson*, 2 G. & J. 228.
2. Where commissioners refuse to find a person a bankrupt, the court will not allow the commission to be re-sealed, and directed to other commissioners.—*Ex parte Nicholls*, 2 G. & J. 266.
3. Where a commission fails through the mistake, either in law or fact, of the original petitioning creditor, the costs of a petition to substitute the debt of another creditor upon which the commission may proceed, are to be paid out of the estate: otherwise if in consequence of misconduct or fraud.—*Ex parte Cousins*, 2 G. & J. 270.
4. Where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions.—*Ex parte Window*, 2 G. & J. 280.
5. Where the petitioner does not appear, the respondent is entitled to his costs, upon producing the office copy of the petitioner's affidavit of service.—*Ex parte Garth*, 2 G. & J. 392.
6. The husband must join in a docket by a *feme covert* upon a debt due to her *en autre droit*.—*Ex parte Mogg*, 2 G. & J. 397.

**PROOF.**

1. Where it was agreed, upon a loan to the bankrupt, that six months' notice should be given before repayment was required; the debt is proveable, though no notice be given before the bankruptcy.—*Ex parte Dorman*, 2 G. & J. 241.
2. A sum covenanted to be paid by the husband when demanded by the trustees, if demanded before the bankruptcy, is proveable.—*Ex parte Brenchley*, 2 G. & J. 174.
3. A seller in France of contraband goods may prove, unless he participate in smuggling them.—*Ex parte Cavaliere*, 2 G. & J. 227.
4. Proof cannot be made by one person on behalf of several creditors.—*Ex parte the Bank of England*, 2 G. & J. 363.

**SECURITY.**

1. A security for a separate demand does not extend to partnership claims.—*Ex parte Freen and Morice*, 2 G. & J. 246.
2. The interest of partners, where the estate was purchased out of the joint property, and mortgaged for a joint debt, is a joint security.—*Ex parte Free*, 2 G. & J. 250.
3. The proprietor of bills improperly applied in reducing the balance between his bankers in the country and their London agents, is entitled to be indemnified from surplus security held by the latter.—*Ex parte Armitstead*, 2 G. & J. 371.

**STATUTE OF LIMITATIONS.**

1. After a commission has issued, debts not before barred, are not affected by lapse of time.—*Ex parte Ross*, 2 G. & J. 330.

**SUPERSEDEAS.**

1. A bankrupt cannot after certificate, petition to supersede because he was not a trader.—*Ex parte Lewis*, 2 G. & J. 208.
2. A commission will not be superseded, even with consent of creditors, until the bankrupt has surrendered.—*Ex parte Peaker*, 2 G. & J. 337.
3. A joint commission may be superseded as to one of the bankrupts, without prejudice to its validity with regard to the other.—*Ex parte Bygrave*, 2 G. & J. 391.

**TAXATION.**

1. The master's taxation of a solicitor's bill under 5 Geo. 2. c. 30. s. 46. is not conclusive until he has signed his certificate.—*Ex parte Neale*, 2 G. & J. 226.
2. A petition to tax a solicitor's bill, after payment, must set out some objectionable items.—*Ex parte Beresford*, 2 G. & J. 259.

**TRADING.**

- A devisee for life, who converts the soil into bricks, is not a trader.—*Ex parte Burgess*, 2 G. & J. 183.

**TRUSTEE.**

- A new trustee may be appointed under 6 Geo. 4. c. 16. s. 79. without reference to the master.—*Ex parte Inkersole*, 2 G. & J. 230.

## ABSTRACT OF PUBLIC GENERAL STATUTES.

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N. B.—We have given the titles to all statutes passed in the present session and in print at the present time; and have fully abstracted those which from the nature and importance of the subject matter require particular notice.  
*June 14, 1828.*

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**CAP. 1.**—An Act for applying a Sum of Money for the Service of the Year One thousand eight hundred and twenty-eight.

[19th February 1828.]

**CAP. 2.**—An Act for raising the Sum of Twelve Millions by Exchequer Bills, for the Service of the Year One thousand eight hundred and twenty-eight.

[19th February 1828.]

**CAP. 3.**—An Act for the regulating of his Majesty's Royal Marine Forces while on Shore.

[21st March 1828.]

**CAP. 4.**—An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.

[21st March 1828.]

**CAP. 5.**—An Act for continuing to his Majesty for One Year certain Duties on Personal Estates, Offices, and Pensions in England, for the service of the Year One thousand eight hundred and twenty-eight.

[26th March 1828.]

**CAP. 6.**—An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the Time limited for those Purposes respectively until the Twenty-fifth Day of March One thousand eight hundred and twenty-nine.

[26th March 1828.]

**CAP. 7.**—An Act to continue for One Year, and from thence to the End of the then next Session of Parliament, so much of certain Acts of the Parliament of Ireland, as relate to the lighting, cleansing, and watching of which no particular Provision is made by any Act of Parliament.

[26th March 1828.]

**CAP. 8.**—An Act for fixing, until the Twenty-fifth day of March One thousand eight hundred and twenty-nine, the Rates of Subsistence to be paid to Innkeepers and others on quartering Soldiers.

[3d April 1828.]

**CAP. 9.**—An Act to enable the Justices of the Peace for Westminster to hold their Sessions of the Peace during Term and the Sitting of the Court of King's Bench.

[3d April 1828.]

The justices of the peace for the city and liberties of Westminster, may hold their session during term and the sitting of the court of

king's bench; the sessions to commence in the week preceding the holding of each of the quarter or general sessions of the peace for the county of Middlesex.

CAP. 10.—An Act for applying certain Sums of Money to the service of the Year One thousand eight hundred and twenty-eight. [3d April 1828.]

CAP. 11.—An Act to exempt Vessels propelled by Steam from the Penalties to which Vessels are liable, under various Acts, for having fire on board in the Ports, Harbours, Rivers, Canals, and Lakes of Ireland. [3d April 1828.]

CAP. 12.—An Act to indemnify Witnesses who may give Evidence, before the Lords Spiritual and Temporal, on a Bill to exclude the Borough of Penryn from sending Members to serve in Parliament. [18th April 1828.]

CAP. 13.—An Act for further regulating the Payment of the Duties under the Management of the Commissioners of Stamps on Insurances from Loss or Damage by Fire. [9th May 1828.]

Enacts that detached buildings, or goods contained in such buildings, occasioning a plurality of risks, shall be valued and insured separately, and that any policy, whereby any insurance from fire shall be made upon two or more separate subjects or parcels of risk collectively in one sum, shall be void, and the person granting or continuing it be liable to a penalty of 100*l*.

CAP.—14.—An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements. [9th May 1828.]

*Note.*—This act extends only to *England* and *Ireland*, and takes effect from 1st January 1829; see ss. 9, 10.

After reciting the Statutes of Limitations 21st Jac. 1. c. 16. and 10 Car. 1. sess. 2. c. 6. (Irish act.) and also that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said statutes, and that it was expedient to prevent such questions; enacts, that in actions of debt or upon the case grounded on any simple contract, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. Joint contractors, or executors or administrators of any contractor, shall not be chargeable in respect of any written acknowledgment of his co-contractor, &c. but this enactment is not to alter, take away, or lessen the effect of any payment of principal or interest made, by any person whatsoever. In actions against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants



against whom he shall recover, and for the other defendant or defendants against the plaintiff. s. 1.

*Pleas in abatement.*—If a defendant in any action on simple contract shall plead in abatement that any other person ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited acts or this act be maintained against such other person, the issue joined on such plea shall be found against the party pleading the same. s. 2.

*Indorsements of payment.*—No indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statutes. s. 3.

*Set-off.*—The said acts and this act shall apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise. s. 4.

*Contracts by Infants.*—No action shall be maintained upon any promise or ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. s. 5.

*Representations of character.*—No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith. s. 6.

*Executory contracts for the sale of goods.*—Reciting that the 29 Car. 2.c.3. and the Irish Act, 7 W. 3. c. 12. did not extend to certain executory contracts for the sale of goods, enacts that the said acts shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. s. 7.

*Stamps on Agreements.*—The memorandums or agreements required by this act are exempted from stamp duty. s. 8.

CAP. 15.—An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in support thereof. [9th May 1828.]

Enacts that it shall be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general goal delivery in England, Wales, Berwick-upon-Tweed and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any

matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls and other records of the court from which such record issued, shall be amended accordingly.

CAP. 16.—An Act to repeal so much of several Acts as empowers the Commissioners for the Reduction of the National Debt to grant Life Annuities. [9th May 1828.]

CAP. 17.—An Act for repealing so much of several Acts as imposes the necessity of receiving the Sacrament of the Lord's Supper as a Qualification for certain Offices and Employments. [9th May 1828.]

So much of 13 Car. 2. st. 2. c. 1., 25 Car. 2. c. 2. and 16 Geo. 2. c. 30., as imposes the necessity of taking the sacrament for the purposes in the said acts mentioned, is repealed, s. 1.

Every person who shall hereafter be elected into the office of mayor, alderman, recorder, bailiff, town clerk, common councilman, or in or to any office of magistracy, or place, trust or employment relating to the government of any city, corporation, borough, cinque port within England and Wales, or the town of Berwick upon Tweed, shall within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:

I A. B. do solemnly and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office of \_\_\_\_\_ to injure or weaken the Protestant church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be by law entitled. s. 2.

This declaration shall be made before such persons as by the charters or usages of the corporation ought to administer the oath for the due execution of the said offices, or, in default of such, in the presence of two justices. s. 3.

In case the party shall neglect to make the declaration, the election shall be void. s. 4.

Every person who shall be admitted into any office or employment, or who shall accept from His Majesty any patent, grant, or commission, or by the receipt of any salary, &c. would before the passing of this act have been required to take the sacrament, shall within six calendar months after his admission to office, or acceptance of patent, &c. make and subscribe the said declaration, or his appointment shall be void. s. 5.

The declaration shall be made by the last mentioned persons in the court of chancery, king's bench, or at the quarter sessions, where the person required to make the same shall reside. s. 6.

**Exemptions.]**—Naval officers below the rank of rear admiral, military officers below the rank of major general in the army or colonel in the militia, commissioners of customs, excise, stamps, or taxes, or any persons holding offices subject to the said commissioners, or any of the officers concerned in the collection, management or receipt of the revenues subject to the authority of the postmaster general. Persons appointed during their absence from England, or within three months after appointment, may make the declaration within six months after their return. s. 7.

All persons in the actual possession of any office, command, place, trust, service, or employment, or in the receipt of any pay, salary, fee, or wages in respect of or as a qualification for which they ought to have taken or ought to receive the sacrament, are confirmed in such possession, and indemnified from penalties, and the election, &c. of such persons shall be valid. s. 8.

The omission of persons to make the said declaration shall not affect others not privy thereto. s. 9.

**CAP. 18.**—An Act to repeal the Stamp Duties on Cards and Dice made in the United Kingdom, and to grant other Duties in lieu thereof; and to amend and consolidate the Acts relating to such Cards and Dice, and the Exportation thereof. [9th May 1828.]

All former acts, except as to arrears of duty, and as to bonds entered into in pursuance of former acts, the conditions of which have not been performed, are repealed in s. 1. Every maker of playing cards or dice shall pay annually for a licence five shillings; for every pack of playing cards one shilling; and for every pair of dice twenty shillings. s. 2. The duty shall be denoted on the ace of spades. s. 4. The makers omitting to make out an annual licence are subject to a penalty of 100*l.* and forfeiture of all materials. s. 5.

*Note.*—The other sections of this act relate to the collection and payment of the duties, and to regulations as to exportation.

**CAP. 19.**—An Act for applying a Sum of Money out of the Consolidated Fund for the Service of the Year One thousand eight hundred and twenty-eight. [9th May 1828.]

**CAP. 20.**—An Act for prohibiting, during the present Session of Parliament, the Importation of Foreign Wheat into the Isle of Man; and for levying a Duty on Meal or Flour made of Foreign Wheat imported from the Isle of Man into the United Kingdom.

[13th May 1828.]

**CAP. 21.**—An Act to regulate the Carriage of Passengers in Merchants' Vessels from the United Kingdom to the Continent and Islands of North America. [23d May 1828.]

**CAP. 22.**—An Act to consolidate and amend the Laws relating to the Trial of controverted Elections or Returns of Members to serve in Parliament. [23d May 1828.]

The acts repealed are 10 Geo. 3. c. 16. 11 Geo. 3. c. 42. 14 Geo. 3. c. 15. Part of 25 Geo. 3. c. 84. Part of 28 Geo. 3. c. 52. 32 Geo. 3.

c. 1. 34 Geo. 3. c. 83. 36 Geo. 3. c. 59. 42 Geo. 3. c. 84. 47 Geo. 3. c. 1. Part of 47 Geo. 3. c. 14. 53 Geo. 3. c. 71. See sec. 1.

Upon a petition being presented complaining of an undue election or return, a time shall be fixed for taking the same into consideration, and notice thereof given by the speaker to the sitting members and to the petitioners. s. 2. If petitioners do not attend at the time appointed, the order for taking the petition into consideration shall be discharged, and such petition shall not be any further proceeded upon. s. 3. No petition to be proceeded upon unless petition shall be subscribed by a person having a right to vote, or by a person who had been a candidate. s. 4. The petitioners shall within fourteen days after presentment of petition, enter into a recognizance in the sum of 1000*l.*, with two sureties in the sum of 500*l.* each, or four sureties in the sum of 250*l.* each for the payment of costs. s. 5. The names and additions of sureties shall be delivered to the clerk of the house of commons on the day the petition is presented, or the day after at furthest. s. 6. The sureties shall enter into recognizances before the speaker. s. 7. The parties or sureties living more than forty miles from London may enter in recognizances before a justice. s. 8. Petitions shall not be withdrawn unless the member returned shall have vacated his seat, or some matter shall have arisen since the presentment of petition, s. 9. A voter, upon petition, may become a party to oppose or defend the return. s. 10. Where the seat becomes vacant, or the sitting member declines to defend his return before the petition is taken into consideration, notice shall be sent by the speaker to the returning officer of the place to which the petition relates, who shall affix a copy of such notice on the county hall, town hall, or parish church, nearest to the place of election: notice shall also be given in the London Gazette, and the consideration of such petition shall be adjourned, so that thirty days may intervene between the day on which such notice shall be inserted in the Gazette and the day on which the petition shall be taken into consideration. s. 11. Within thirty days after such notice persons claiming a right to vote may be admitted as parties to defend the return. s. 12. Members who shall have given notice of their intention not to defend their return, shall not be admitted as parties in subsequent proceedings, and such members shall be restrained from sitting or voting on any question until such petition shall be decided upon. s. 13. Lists of votes intended to be objected to, shall be delivered to the clerk of the house of commons, which list shall be open to the inspection of the parties. s. 14. The evidence as to the validity of votes shall be confined to the objections particularized in the lists. s. 15. Committees are empowered to send for and examine persons, papers and records. s. 39. Witnesses misbehaving themselves may be committed to the custody of the serjeant at arms. Id. When the merits of a petition depend on questions respecting the right of election, &c. the committee are to require statements in writing of such rights and to report thereon. s. 50. Petitions of appeal against the judgment of the committee to be presented to the

house within six months after a report has been made on any right of election, otherwise the judgment of such committee to be deemed final. s. 51. Notice of the time of taking petitions of appeal into consideration shall be inserted in the London Gazette and sent to the returning officers, who are to affix such notice on the county hall, &c., and any person may, at any time before the day appointed for taking such petition of appeal into consideration, be admitted to defend the right of election, &c. ss. 52. 53. When the petition shall be deemed frivolous and vexatious, the costs shall be recovered by the parties who opposed such petition from the person or persons or any of them who signed such petition. s. 57. When the opposition to such petition shall be deemed frivolous or vexatious the costs may be recovered from the parties or any of them who opposed such petition. s. 58. Where the petition is not opposed, the costs shall be paid by the sitting members, or by such persons as the house shall have admitted or directed to oppose such petition, s. 59. Application for payment of costs must be made to the speaker within three months after the determination of the merits of the petition; the bills of costs to be taxed by proper officers, to be appointed by the speaker, as between attorney and client. ss. 60, 61. The costs, after demand made, may be recovered by action of debt, and the speaker's certificate of the amount shall have the force and effect of a warrant to confess judgment. s. 63. Persons paying costs may recover a portion thereof from other persons liable thereto. s. 64. If petitioners shall neglect to pay the costs to witnesses within seven days after demand made, or shall refuse to pay the other costs within six months, the recognizances shall be estreated. s. 65. If the returning officer shall wilfully neglect or refuse to return the person duly elected, he shall be liable to an action at the suit of such person, who shall recover double damages and full costs of suit. s. 66. The act to take effect from the last day of the present session, s. 57.

*Note.*—The other sections relate to the appointment of, and proceedings before committees.

## LAW COMMISSIONS.

*Copy of Commission of Enquiry into the Law of England, respecting Real Property.*

GEORGE the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith : to our trusty and well beloved John Campbell, Esq., one of our counsel learned in the law, William Henry Tinney, Esq., John Hodgson, Esq., Samuel Duckworth, Esq., and Peter Bellinger Brodie, Esq., barristers at law, greeting : Whereas we have thought it expedient, for divers good causes and considerations us thereunto moving, that a diligent and full enquiry should forthwith be made into the law of England, respecting real property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto, for the purpose of ascertaining and making known to us, whether any and what improvements can be made therein ; know ye, that we reposing great trust and confidence in your zeal, industry, discretion and integrity, have authorized and appointed, and do by these presents authorize and appoint you, the said John Campbell, William Henry Tinney, John Hodgson, Samuel Duckworth and Peter Bellinger Brodie, or any three or more of you, to make a diligent and full enquiry into the law of England, respecting real property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto, and that you enquire whether any and what improvements can be made therein, and how the same may be best carried into effect : and for the better discovery of the truth in the premises, we do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such and so many of the officers, clerks and ministers of our courts of law and equity, and other persons, as you shall judge necessary, by whom you may be the better informed of the truth in the premises, and to enquire of the premises and every part thereof, by all other lawful ways and means whatsoever : and we do hereby give and grant unto you, or any three or more of you, full power and authority when the same shall appear to be requisite, to administer an oath or oaths to any person or persons whatsoever, to be examined before you, or any three or more of you, touching or concerning the premises ; and we do also give and grant to you, or any three or more of you, full power and authority to cause all and singular the officers, clerks and ministers of our said courts of law or equity, to bring and produce upon oath before you, or any three or more of you, all and singular rolls, records, orders, books, papers or other writings belonging to our said courts, or to any of the officers within the same as such officers : and our further will and pleasure is, that you do within two years after the date of this our commission, or as soon as the same can conveniently be done, (using all diligence), certify to us in our court of chancery, on parchment, under your hands and seals, or under the hands and seals of any three or more of you, whether any and what improvements can be made in the law of England, respecting real property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto, and how such improvements (if any) may be best carried

into effect ; and we further will and command, and by these presents ordain, that this our commission shall continue in full force and virtue, and that you our said commissioners, or any three or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment : and we do hereby direct and appoint, that you, or any three or more of you, may have liberty to certify your several proceedings from time to time to us in our said court of chancery, as the same shall be respectively completed and perfected : and we hereby command all and singular our justices of the peace, sheriffs, mayors, bailiffs, constables, officers, ministers, and all other our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents : and for your assistance in the due execution of this our commission, we have made choice of our trusty and well beloved Charles James Swan, Esq., to be secretary to this our commission, and to attend you ; whose service and assistance we require you to use from time to time as occasion shall require : In witness whereof, we have caused these our letters to be made patent. Witness Ourself, at Westminster, the sixth day of June, in the ninth year of our reign.

By Writ of Privy Seal,

Crown Office in Chancery.

BATHURST.

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*Copy of Commission of Enquiry into the course of Proceedings in Actions, &c. in the superior Courts of Common Law in England and Wales.*

GEORGE the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith : To our trusty and well-beloved John Bernard Bosanquet, Esq. one of our sergeants at law ; Henry John Stephen, Esq. serjeant at law, Edward Hall Alderson, Esq., James Parke, Esq., and John Patteson, Esq. barristers at law, greeting : Whereas we have thought it expedient, for divers good causes and considerations us thereunto moving, That a diligent and full enquiry should forthwith be made into the course of proceeding in actions and other civil remedies established or used in the superior courts of common law in England and Wales, from the first process and commencement, to the termination thereof, and into the process, practice, pleading, and other matters connected therewith : And that enquiry should be made, whether any and what parts thereof may be conveniently and beneficially discontinued, altered or improved, and how the same may be best carried into effect ; and whether or in what manner the dispatch of the general business in the said courts may be expedited : Know ye, that we, reposing great trust and confidence in your zeal, industry, discretion and integrity, have authorized and appointed, and do by these presents authorize and appoint you, the said John Bernard Bosanquet, Henry John Stephen, Edward Hall Alderson, James Parke and John Patteson, or any three or more of you, to make a diligent and full enquiry into the course of proceeding in actions, and other civil remedies established or used in our superior courts of common law, from the first process and commencement, to the termination thereof, and into the process, practice, pleading, and other matters connected therewith, and to enquire whether any and what parts thereof may be conveniently and beneficially discontinued, altered or improved ; and what (if any) alterations amendments or improvements may be beneficially made therein, and how

the same may be best carried into effect ; and whether and in what manner the dispatch of the general business in our said courts may be expedited : And for the better discovery of the truth in the premises, we do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such and so many of the officers, clerks and ministers of our said courts, and other persons as you shall judge necessary, by whom you may be the better informed of the truth in the premises, and to enquire of the premises, and every part thereof, by all other lawful ways and means whatsoever : And we do hereby give and grant unto you, or any three or more of you, full power and authority, when the same shall appear to be requisite, to administer an oath or oaths to any person or persons whatsoever, to be examined before you, or any three or more of you, touching or concerning the premises ; And we do also give and grant to you, or any three or more of you, full power and authority to cause all and singular the officers, clerks and ministers of our said courts, to bring and produce upon oath before you, or any three or more of you, all and singular rolls, records, orders, books, papers, or other writings, belonging to our said courts, or to any of the officers within the same, as such officers : and our further will and pleasure is, that you do within one year after the date of this our commission, or as soon as the same can conveniently be done, (using all diligence) certify to us in our court of chancery, on parchment, under your hands and seals, or under the hands and seals of any three or more of you, whether any and what part or parts of the proceedings in actions and other civil remedies, established or used in our said courts, or of the process, practice, pleading and other matters connected therewith, may be conveniently and beneficially discontinued, altered or improved, and what (if any) alterations amendments or improvements may be beneficially made therein, and how the same may be best carried into effect ; and whether and in what manner the dispatch of the general business in our said courts may be expedited : And we further will and command, and by these presents ordain, that this our commission shall continue in full force and virtue ; and that you our said commissioners, or any three or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment ; and we do hereby direct and appoint, that you, or any three or more of you, may have liberty to certify your several proceedings from time to time to us, in our said court of chancery, as the same shall be respectively completed and perfected ; and we hereby command all and singular our justices of the peace, sheriffs, mayors, bailiffs, constables, officers, ministers, and all other our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents : And for your assistance in the execution of this our commission, we have made choice of our trusty and well-beloved George Faulkner, attorney at law, to be secretary to this our commission, and to attend you ; whose service and assistance we require you to use from time to time, as occasion shall require : In witness whereof, we have caused these our letters to be made patent. Witness Ourselves, at Westminster, the sixteenth day of May, in the ninth year of our reign.

By Writ of Privy Seal,

Crown Office in Chancery.

BATHURST.



## EVENTS OF THE QUARTER.

THE most important event that has occurred within the period which it is our duty to comprise, is the appointment of the law commissioners. On this, however, it is not necessary to dwell, as the public know full well the characters and attainments of the gentlemen selected by the Ministry. Serjeants Bosanquet and Stephen, Messrs. Parke, Patteson, and Alderson have, perhaps, as intimate an acquaintance with the law of actions as any men whom it was possible to choose, and in the intricacies of pleading are all particularly versed. But with the exception of Mr. Serjeant Stephen (whose work is as admirable for the comprehensiveness of its views as for the clearness and accuracy of its details), we are not aware that the individuals alluded to have ever done, said, or written anything which affords an earnest of legislative ability; much less, a fair reason for supposing that the plan or groundwork of the system will be changed. The theorist has little to anticipate; the formalist slight cause for apprehension. A body so constituted, and we speak it to their praise, will respect the rules that have guided them so long, and touch with care what past ages have bequeathed us; but they will bring to light many causes of delay; they will clear away the nonsense of antiquity; and simplify where simplicity is attainable.

Of course little progress has hitherto been made: they have intimated, however, a readiness to attend to all who have amendments to suggest; and the propriety of doing away with the general issue has been already the subject of discussion. We hear that considerable difficulty has been experienced in settling this amendment, from the fear of imposing too great a burthen of proof on the defendant. It is also said that a proposition has been made to retain the general issue, and require a notice of the particular defence; in analogy, we presume, to the particular of demand.

With respect to the commission, of which Mr. Campbell is the head, and Messrs. Brodie, Hodgson, Duckworth and Tinney the subordinate members, it can hardly hope for that degree of confidence which the other may plausibly demand. Mr. Campbell's fame is principally built upon his knowledge of mercantile and not of conveyancing jurisprudence; and his coadjutors, though all reputed good draughtsmen and sound lawyers, are certainly not the highest of their class. Report says that appointments were refused by many of the ablest men; a fact which may account, in some measure, for the comparative inferiority of the body. It is generally understood that Messrs. Hodgson and Duckworth are rather fond of innovation; Messrs. Brodie and Tinney opposed to it; and Mr. Campbell well fitted for a moderator, as far, at least, as opinions are concerned.

The list, given above, of proposed enactments, will show sufficiently how the legislature has been dealing with jurisprudence. The most important of these, is the projected change in the jurisdiction of the county courts; which, it seems, is to be extended immediately to all debts under 10*l.*; the process and pleading to be ex-

remely simplified ; and the jury to consist of five persons only, qualified like jurymen in the Courts of Westminster. Should the bill operate well, Mr. Peel proposes to extend the jurisdiction to all debts under 20*l*. The particular provisions are not as yet determined on ; but Mr. Peel of course must know that the present county courts are the worst of nuisances ; that the inferior rate of remuneration has compelled respectable practitioners to abandon them, and that the business is almost wholly conducted by the lowest retainers of the law. The consequence is, that a trifling debt is hardly ever sued for in the hope of recovering a sixpence, but merely for the purposes of revenge ; and justice is brought home to the doors of the poor, to make them the victims of oppression. Nor is this entirely attributable to the present limited jurisdiction of the tribunal. The Lancaster county court has cognizance of pleas to the amount of 10*l*., and we understand from credible authority that great inconveniences have uniformly resulted from it.

The only recent professional changes are the retirement of Mr. Marryatt from attendance on the courts, and the appointments of Mr. Horace Twiss to be Under Secretary for the Colonies, and of Mr. Shepherd to be counsel to the Admiralty. The first of these was in extensive practice, and laboured hard to execute well ; but, diligence excepted, we cannot assign him the higher merits of an advocate. He is a good case-lawyer, and troubles himself very little about principles ; is well acquainted with laws as they are, and neither knows nor cares about their origin. We say this without apology, for it is the boast of the gentleman we are speaking of, that, since he left school, he has never read any but law books. " I do not wish to be understood," says an acute critic, " that he is upon a level with an Irish barrister, who, referring to two great events, the obtaining Magna Charta, and the Bill of Rights, confounded the sovereigns from whom they were exacted ; nor with the celebrated English barrister, who, having occasion to quote a statute, and being required to mention the period at which it passed, very gravely replied, that it was in the reign of one of the Henrys, or one of the Edwards, but he could not exactly tell which : ordinary conversation, and the indorsements upon his Ruffhead, supposing he never opened it, would afford sufficient instruction to avoid such exposures. There is no doubt, however, that he is what would be considered in well-educated society—that society for which his rank qualifies him—an ignorant man." As a speaker, Mr. Marryatt does not rise to mediocrity ; his language is bad, and his action peculiarly ungraceful ; yet now and then he succeeded in a metaphor. " It poured forth," said he on one occasion, (he was speaking of a chimney) " it poured forth whole volumes—volumes did I say ?—whole *encyclopedias* of smoke !" In examining a witness he was occasionally effective ; rather, however, by perseverance than acuteness. No retort confused or startled him ; and he would patiently reiterate a question till all modes of evasion had been tried in vain. In private life he is reputed an amiable and excellent man.

Mr. Horace Twiss has not formally seceded from the profession, yet for a time, at least, he must surrender it, as inconsistent with the duties of his post. Some surprise has been expressed at his appointment, and the public at large are by no means aware of his capacity, though few men have made better speeches. On his first attempt, the common rules of courtesy were departed from, and he was most illiberally received. He had proceeded for about ten minutes when he came to

the words, "I have now said enough"—"on this branch of the subject," he meant to say, but the sentence was suddenly cut short by a loud "hear," we believe, from Mr. Brougham. The joke was too tempting to be lost, and the cry re-echoed through the house. "I have now said enough," repeated Mr. T. "Hear! hear! hear!" reiterated his auditors; and the result of course was irretrievable confusion. But conscious talent is not easily put down, and the individual in question was well entitled to say, like Sheridan when Woodfall told him he had failed, "I have it in me, and by G— it shall come out." His next appearance was in a debate on the everlasting Catholic question. He rose about half past seven, the least interesting hour in an interesting debate, as many of the members are then regaling at Bellamy's. The duke of Norfolk and several Catholic peers were under the gallery, watching anxiously each turn of the discussion; and a murmur of disappointment was distinctly audible, when a young and briefless barrister, with all the shame of former failure on his head, rose up to second their pretensions. It was for him an awful moment. Sink him now, and he was sunk for ever. But his cause was strong: he was conscious of its strength; and on this most hacknied of all hacknied topics his views were decidedly original. Attention was rivetted, and the house was rapidly refilled. It was a clear unanswerable speech, and he sat down amidst thunders of applause. The late lord Londonderry shook him warmly by the hand, with a "Depend upon it—they'll hear you for the future;" and the duke of Norfolk immediately requested an introduction, and was profuse in thanks and congratulations. An indifferent observer would have said, that from that moment his success was certain; and no one who has read the Morning Chronicle reports of his speeches on Sir F. Burdett's motion for an inquiry into the affair at Manchester, and on Mr. G. Lamb's motion for allowing counsel to felons, would hesitate to say, that his more recent efforts are fully equal to his second. Yet, though the house of commons are conscious of his powers, there has always been a prejudice against him, attributable partly to a vague report of his early politics, and partly to the jealousy invariably entertained by that assembly of any one whom they suspect of entering it as a political adventurer. What right has any man, they naturally enough exclaim,—what right has any man to come amongst us, without birth, or wealth, or high professional celebrity? Though Burkes and Cannings may bear down the cry, less-gifted men must quail before it, till a fortunate emergency occurs. The late change was such to Mr. T., and we feel assured that he will not be wanting to the opportunity.

Of Mr. Shepherd we are not called upon to speak.

# THE LAW MAGAZINE.

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## ART. I.—THE CONSTITUTION AND PRACTICE OF THE ENGLISH COURTS OF COMMON LAW, WITH A SKETCH OF THE JUDICIAL SYSTEM OF FRANCE.

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1. *An Inquiry into the Present State of the Civil Law of England.* By JOHN MILLER, Esq. of Lincoln's-Inn. Murray. 1825.
  2. *Rationale of Judicial Evidence specially applied to English Practice.* From the Manuscripts of JEREMY BENTHAM, Esq. Benchet of Lincoln's-Inn. Hunt and Clarke. 1827.<sup>1</sup> Book VIII. *On the Technical System of Procedure.*
  3. *Des Institutions Judiciaires de l'Angleterre comparées avec celles de la France, et de quelques autres Etats anciens et modernes.* Par JOSEPH REY, de Grenoble, Avocat, ancien Magistrat. A Paris, chez Nève, Libraire, Palais de Justice. 1826.
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WE have now before us a comprehensive view of the civil law of England, and a direct attack on every part of it,—Mr. Miller's enlightened observations and Mr. Bentham's very prejudiced abuse; and we have also prefixed to the present article a work replete with useful information as to the legal institutions of France and other nations of the continent. By the help of these we shall endeavour to ascertain the imperfections of our judicial system and to what extent that system is improveable; but as an acquaintance with its history is essential in a discussion of its qualities, and some of our readers may not be conversant with legal antiquities, we think it best to begin with a few words of explanation.

<sup>1</sup> This work is edited, and with great ability, by Mr. J. S. Mill.

Though opinions may vary as to the efficiency of our courts, their most ardent admirer will hardly venture to deny that they sprung up in barbarous times, and retain some symptoms of their origin. Alfred is said to have organised a series of tribunals rising one above another in just and equable gradation; but when the Saxon laws were superseded by the Conqueror and foreign customs established instead, regularity of plan seems to have been wholly disregarded, and jurisdiction was parcelled out with territory as a species of profitable domain. Every manor had a court attached to it, in which the lord presided, and many barons became possessed of franchises with almost regal privileges.

That gross corruption and partiality then prevailed, that right was constantly borne down by violence, it is almost superfluous to say; and the county court, though still kept up, afforded but an inadequate protection; for the freeholders being the sole judges, it partook more of the nature of a popular assembly than a sober and dispassionate tribunal. At the time therefore to which we now allude, a suitor had literally no chance whatever of procuring an impartial hearing before any of the local authorities. Sue a wrong doer in the baron's court, and he gave it in favour of his follower. Bring the case before the county court, and the great man would go canvassing for votes, like a modern knight of the shire preparing for a general election; "forevery man that had a suit there sped according as he could make parties."<sup>1</sup> The only refuge of a litigant was in the paramount jurisdiction of the sovereign; men fled from petty tyrants to the throne; and our early kings were always ready to afford protection, if the claimant was rich enough to oil the wheels of justice and stimulate their compassion with a bribe. Other causes contributed to bring about a change. It was ordained by an edict of the Conqueror that proceedings should be carried on in the French instead of the English language; and as the subtleties of the Normans, always noted for a shrewd and litigious people, were adopted with their tongue, jurisprudence soon grew into an art which the barons and freeholders were too indolent to learn. In process of time, says Lord Hale,

<sup>1</sup> Hale's History of the Com. Law, chap. vii. Meyer, tom. i. ch. 22.

they neglected to study the laws, as great men usually do.<sup>1</sup> Yet, though the local courts soon sunk into insignificance, no formal transfer of judicial power was made. It is one advantage of an ill-defined establishment that it is always capable of being moulded to circumstances; and the emergency in the present instance was supplied without the intervention of the legislature. During the early periods of our history, both before and after the conquest, the king in parliament possessed an original as well as an appellate jurisdiction over all causes whatever arising in any part of his dominions. This at first was sparingly exercised, it being considered beneath the dignity of the sovereign and the governing assembly to take cognizance of the disputes of individuals, unless the peace of the kingdom was threatened or the influence of the litigants was great. Fees, however, were a fertile source of revenue; and, as the country became more settled and its commerce increased, large sums were readily disbursed to purchase the privilege of being heard before the supreme tribunal; and suits in the first instance and appeals multiplied to so considerable an extent, that it was found impossible for parliament to dispose of them and discharge at the same time the duties of legislation. To obviate the inconvenience, particular meetings for the dispatch of law business appear to have been called from time to time, which were principally attended by the great officers of the crown, they being the members most frequently at hand. These meetings becoming regular, a distinct tribunal imperceptibly arose, and, under the name of the *Aula Regia*, soon monopolized all causes of importance. So great indeed was the press of business, that additional changes were very speedily required, and a new division of labour took place. A court, with the exclusive cognizance of cases of civil right (the Common Pleas), and a court for the collection of the revenue and the decision of all disputes relating to it (the Exchequer<sup>2</sup>), were detached from the *Aula Regia*; whilst, to repress the encroachments of the

<sup>1</sup> *Ubi supra*. Another reason given by him for the disuse of the county courts, is their breeding variety of laws. This, no doubt, would have been the result, but the reason is too refined for the period.

<sup>2</sup> Some writers have thought that the Exchequer was always distinct. See Maddox's Hist. of Exch.

greater feudatories and facilitate the redress of grievances, itinerant justices were dispatched into the country, at intervals, generally, from seven years to seven years, though their circuits sometimes returned at shorter intervals and were finally required by Magna Charta to be made every year at least. This invention was step by step improved upon, though warmly resisted by the aristocracy, till the itinerant justices assumed the character of the modern judges of assize; but with regard to other parts of the arrangement, the original intention was by no means so steadily pursued.

When the three great common law courts were separated, the intention was, that the jurisdiction of each should be exclusive; that the Exchequer should confine itself to the revenue; that the Common Pleas should decide all private differences; and that the King's Bench, retaining the residue of the authority originally possessed by the Aula Regia, should take cognizance of every species of transaction affecting the peace and good order of the kingdom. But the King's Bench and Exchequer were not contented with their shares, and set about invading the co-ordinate jurisdiction. This was done—in the Exchequer, by assuming that the complainant was indebted to the king and by reason of the alleged injury had become incapable of discharging his majesty's debt, who therefore had an interest in the cause;—in the King's Bench, by bringing the defendant into court for a supposed breach of the peace, and charging him when there with the true cause of action; the judges maintaining that a party, whilst in their court, could not be charged elsewhere, even for matters of a mere civil nature. The legislature interfered more than once, and the Common Pleas complained loudly of these practices, and attempted to out-manceuvre its rivals<sup>1</sup>; but laws were passed and rules were formed in vain; the fictions were steadily persevered in, and at this hour neither the King's Bench nor the Exchequer has any claim to the better part of its business than what is founded on an antiquated falsehood.

The precise dates of these several alterations we do not pretend to fix; antiquaries are contending, *et adhuc sub judice lis est*.<sup>2</sup> We merely wish to remind our readers that these

<sup>1</sup> See North's Life of Lord Keeper North.

<sup>2</sup> See Hallam's Middle Ages, Ch. 8. Maddox's History of the Exchequer Chamber

changes took place, not so much from any matured intention on the part of the government of the time, as from a natural and obvious adaptation to the wants of the community; and we believe we may venture to add that the times and methods of judicial procedure are equally independent of a plan. Four seasons of the year have been set apart for the administration of justice, in accordance with customs and institutions which are now but imperfectly understood. Selden contends that Terms were fixed by the Conqueror, whilst Spelman and Blackstone have maintained that they are nothing more than those leisure seasons of the year which were not occupied by the great festivals and fasts or were not liable to the general avocations of rural business. With regard to that infinity of rules which go by the name of practice, they are little better than a rude mass of temporary expedients; and the mode in which the fees of officers and the charges of practitioners have been fixed is liable to the same sort of objection.

And not merely the three great tribunals, but hardly any court of importance in the kingdom, can claim a better pedigree. The Lords, the Chancellor, the Master of the Rolls, the Admiralty and Ecclesiastical Judges, are in the same predicament; all originally usurped their jurisdiction, or sprung up some centuries ago, the crude inventions of uncultivated times. With these, however, we have no concern at present; we shall limit our observations to the Courts of Common Law, and, in relation to these, we wish to fix with all possible preciseness, how far the productions of time and accident are consistent with reason and expediency. Do our judicial establishments suffice to the wants of the community and accord with the spirit of the times? Are three great courts enough? Are ambulatory judges better than local? Have we arrived, undesignedly, as it were, and in the natural order of things, at the precise point to which sound policy would fix us? Is there nothing we can copy from foreigners, or strike out by persevering thought, to lessen the evils of litigation and curtail the resources of dishonesty? These are questions of vast

Reeves' *Hist. passim*; An *Historical Treatise*, by Crompton and Sellon, prefixed to Boote's *History of a Suit of Law*; and the *Work of M. Meyer*, entitled, *Esprit, Origine et Progrès des Institutions Judiciaires des principaux Pays de l'Europe*.



importance to society. We shall show how they have been answered by others, and then try to answer them ourselves ; and, as Mr. Bentham is the plainest of our monitors, we will give at once the heads of his advice.

“ It is quite impossible,” says the philosopher of Westminster, “ to conceive any thing more iniquitous than the administration of English law. The formation of the system has fallen every where to the share of the judges, whose object has been invariably the procurement of the maximum of profit combined with the maximum of ease, immediately to themselves and intermediately to the several other classes of lawyers. Judge and Co. (a favourite phrase with him) have always done their best to sophisticate, entangle, and obscure. In pointing out the artifices of priestcraft, what multitudes have already exercised themselves ! The artifices of lawyers have been not less numerous, not less wicked, not less successful ; yet scarce has any hand yet lifted up so much as a corner of the veil that covers them. Hearing refused to parties ! Tribunals put out of reach ! Sittings separated by long and protracted intervals ! Pleadings in writing spun out under a licence for telling lies ! Destruction of just claims on grounds void of all relation to the merits ! Good evidence excluded — bad received ! Jargon without end — fiction without shame ! Such are a few of the blessings of the technical system which the people have suffered to grow up under the notion that rules and formalities are a protection to property. It is the hypothesis of interest, and interest-begotten prejudice. What says the simple truth ? Pretty exactly the reverse. Summary justice, that sort of justice which has been provided for poor and low people who cannot afford to have it good, as neck beef and sticking pieces are provided by the butcher for those who cannot come up the price of ribs and surloins,—that, in fact, is the only justice worth having. In the progress of society simple justice is exchanged for artificial, just as simple aliments are superseded by luxuries. Disease is the result in the one case, and fraud and robbery in the other. The remedy, however, is obvious. Tread back your steps, with reason for your guide ; return at once to natural procedure, the character of which is understood in a moment. Liberty in its original sense is the absence of coercion. Natural procedure is the absence of those rules and

formalities of which technical procedure is composed. 'A man judges, as Monsieur Jordan talked prose, unconscious of any science displayed, of any art exercised. One of your two sons leaves his task undone, and tears his brother's clothes; both brothers claim the same playthings: two of your servants dispute to whose place it belongs to do a given piece of work. You animadvert upon these delinquencies, you settle these disputes: it scarce occurs to you that the study in which you have been sitting to hear this, is a tribunal, a court; your elbow chair a bench; yourself a judge. Yet you could no more perform these several operations without performing the task of judicature; without exercising the functions of a judge, without hearing evidence, without making inquiry, than if the subject of inquiry had been the Hastings cause, the Douglas cause, or the Literary Property cause.'<sup>1</sup> Why then should we regard as a recondite mystery what all of us might practice if we chose? Why continue the dupes of a set whose inefficiency and knavery are notorious to the world? So often as the legislature has sanctioned courts-martial, conferred summary jurisdiction on justices of the peace, or established a court of requests, so often has it pronounced the superiority of natural and simple over artificial and complicated law; and neither liberty, nor property, nor even life itself, can be secure, till the same principle is acted on throughout; till the pretended checks of method are dispensed with, and arbitrary judgments universally revived."<sup>2</sup>

Such is Mr. B.'s advice. As we could not afford room for long extracts, we have adopted the plan of the Noodle's Oration in the 84th Number of the Edinburgh Review, and put his sentiments into the form of an address, conveying always the opinions of the supposed speaker and very frequently his words and illustrations. The whole of the 8th Book of his work is little more than an application of the same thoughts to the particulars of English practice; an exercise which any apt scholar or disciple may easily go through by himself without the assistance of a tutor; as he has only to look over the books of authority, and abuse every thing which he does not understand, or which departs in the slightest degree from the simplicity of savages. Yet this mode

<sup>1</sup> Rat. of Jud. Ev. vol. iv. p. 8.

<sup>2</sup> Id. book viii. chap. xxviii. *et passim*.

of reform, so useful as it is, so universal as it is capable of becoming, and much as Mr. B. seems to pride himself on the originality of his speculations, is taken literally and without acknowledgement from a work composed with a very different intention — from the *Vindication of Natural Society*, by Mr. Burke.<sup>1</sup> That admirable production is now well known to have been written as a parody on Bolingbroke, for the express purpose of exposing the petulance and ignorance of those who are eternally railing at the refinements of cultivated life; — of showing that nothing can be safe, in laws or morals, religion or philosophy, if systems and institutions are indiscriminately assailed, without allowing for the difficulties of legislation or the weakness of mankind. The orator, indeed, was too wary a disputant to refute himself by his own examples. Neither the Hastings, the Douglas, nor the Literary Property cause, is precisely the cause he would have selected as affording fit subject matter for a domestic sitting; but notwithstanding these minor differences, the suggestions are essentially the same. Now Mr. Burke's essay was generally looked upon as conclusive, as we perfectly coincide in the opinion that the *reductio ad absurdum* was satisfactorily made out, we must stand excused from discussing as a theory what has very often amused us as a quiz, and shall quit awhile the philosopher of Westminster to attend to the "Avocat de Grenoble."

<sup>1</sup> See Burke's Works, vol. i. The following passage is one among many of the same tenor: —

"A good parson once said, that where mystery begins, religion ends. Cannot I say, as truly at least, of human laws, that where mystery begins, justice ends? It is hard to say, whether the doctors of law or divinity have made the greater advances in the lucrative business of mystery. The lawyers, as well as the theologians, have erected another reason besides natural reason; and the result has been another justice besides natural justice. They have so bewildered the world and themselves in unmeaning forms and ceremonies, and so perplexed the plainest matters with metaphysical jargon, that it carries the highest danger to a man out of that profession, to make the least step without their advice and assistance. Thus by confining to themselves the knowledge of the foundation of all men's lives and properties, they have reduced all mankind into the most abject and servile dependence. We are tenants at the will of these gentlemen for every thing; and a metaphysical quibble is to decide whether the greatest villain breathing shall meet his deserts, or escape with impunity; or whether the best man in the society shall not be reduced to the lowest and most despicable condition it affords. In a word, my lord, the injustice, delay, puerility, false refinement, and affected mystery of the law are such, that many who live under it come to admire and envy the expedition, simplicity, and equality of arbitrary judgments." p. 66.

"You English," says M. Rey, "have some good things amongst you, but not one-half so many as you think. Your laws are ill defined and vague, and your judges bigoted to abuses; your bar too is notorious for its prejudices; even your boasted jury is ill fitted for its ends; your procedure is about the worst in Europe, and its phraseology a mass of barbarism. Jurisdiction is so strangely parcelled out, and the courts have been so long permitted to encroach on each other with impunity; that the best jurists are often puzzled to decide in what tribunal an action shall be brought; and, when the cause is actually begun, the chances are that some mode of removing it is hit upon or that the Chancellor puts a stop to the proceedings. Then London has become '*un véritable gouffre judiciaire*,' whither all the kingdom must repair for justice, in direct defiance of reason and expediency; an oppression for which a supposed uniformity of decisions and the additional weight acquired by the courts afford a most inadequate compensation. You are placed, in short, in somewhat the same predicament as the French before the Revolution; many of your legal institutions are fairly worn out, and the rest require a thorough cleansing. You want a revolution, and a revolution you will have; a keen observer may already see the signs of it: and this you can no more prevent by petty checks than you can drive back the waves of the ocean from the shore. Fall in then with the spirit of the times, and be assured that your legal establishments must be reformed from within, by the aid and instruction of practitioners, or they will be reformed with a vengeance from without."

Should our readers favour M. Rey with a perusal, they will allow, we trust, that we have fairly interpreted his meaning, and rather softened than exaggerated his revolutionary opinions. These occur in his conclusions, where more seems meant than meets the eye. He talks, for instance, of the expected English revolution having possibly "*un effet decisive et terrible*," and congratulates us that our insular situation, by excluding foreign interference, will enable us to go farther than France in the way of change, and enjoy, at our leisure,

<sup>1</sup> M. Rey is not alone in this reflection. "En Angleterre la plupart des jurisconsultes renfermés dans leur greffes, et ne connoissant que leurs archives, paraissent à peines s'apercevoir du bruit de nos sectes: la loi n'est pour eux qu'une profession." — *Annales de Législation*, No. 1. p. 64.

the blessings of commotion. In a peroration, however, one generally looks for something fine, particularly when the author is a Frenchman; and though it may detract a little from our confidence in his judgment, it leaves untouched the authenticity of his details; and though he blunders a little in describing the English system,<sup>1</sup> we suppose we may trust him in the French. Allowing for the difficulties of the undertaking, and always excepting the insinuations to Mr. Miller's prejudice,<sup>2</sup> and his estimate of English judges, we really think him a liberal and well-informed writer. In order, therefore, to pave the way for a comparison, we will take M. Rey for our guide, and endeavour to sketch an outline of the judicial organization of France.

The French courts for the administration of the civil law (we use this term throughout in contradistinction to criminal) are divided into five classes, some of which, like the English, have a concurrent jurisdiction in criminal cases.<sup>3</sup>

1. *Les juges de paix*—appear to be scattered about the country somewhat in the same manner as our justices of the peace, whom, however, they resemble in little else. Their jurisdiction is threefold. They form what is called *le bureau de conciliation*; to understand which, it will be necessary to bear in mind that, by a law of the Constituent Assembly, passed in 1790, and adopted into the code, no action can be brought until the complaining party has summoned the defendant before one of the *juges de paix*, whose duty it is to endeavour to effect a reconciliation. They have jurisdiction, without appeal, where the ground of action does not exceed 50 francs in value; and jurisdiction, subject to appeal, in all personal actions to the value of 100 francs, and in actions to any amount brought for damage to land, or relating to rural matters, houses and farms, &c. with the exclusive cognizance of disputes between masters and labourers.

2. *Les tribunaux de commerce*—have an exclusive jurisdiction in all matters of trade. Where there is no *tribunal de commerce* in the district, its place is supplied by the court of first instance.

3. *Les tribunaux de premiere instance au civil*—have jurisdic-

<sup>1</sup> See p. 176. 188. of the 2nd vol.

<sup>2</sup> Preface p. 15. note (2).

<sup>3</sup> Thus the *juges de paix* form the *tribunaux de police*, and the *tribunaux de premiere instance au civil* act also as *tribunaux en matiere correctionnelle*.

tion—1. Of appeals from the *juge de paix*. 2. Without appeal, of all actions relating to the person or goods to the amount of 1000 fr. 3. Subject to appeal, of all matters relating to real property to the amount of 50 fr.<sup>1</sup>

4. *Les cours d'appel, ou cours royales au civil*—are courts of appeal from the courts of first instance, and have no original jurisdiction.

5. *La cour de cassation au civil*. There is but one court of cassation for the whole kingdom, and as the institution is peculiar to France, it requires a particular description.<sup>2</sup> It is the supreme court of appeal on points of law only, and its power is confined to annulling the decisions of the inferior courts.<sup>3</sup> According to Mr. Miller, when a cause comes by appeal to the court of cassation, it is not at once determined there, but sent down to another court of the same degree with that from which it has come, in order that it may there undergo revision. If the judgment formerly given should be confirmed in the court to which it is sent down, and again appealed to the *cour de cassation*, it may be sent down a third time to a third court in the same manner, and it is only in case of a third decision contrary to the opinion of the judges of the *cour de cassation*, that the question comes there to be regularly debated. This court then assembles in an *audience solennelle*, under the presidency of the keeper of the seals, and pronounces a final judgment.<sup>4</sup> M. Rey merely says that the regulation of the interests of the parties is always remitted to another tribunal of the same order as that from which it came, but he is silent as to further proceedings. Its duties, according to him, are to maintain the order of jurisdictions, to prevent judicial bodies from exceeding their authority, to compel the observance of fundamental rules of procedure, and, lastly, to preserve the purity and uniformity of legislation. We confess we do not see precisely how all this is to be accomplished; but such is M. Rey's description. He adds,

<sup>1</sup> Rey, vol. i. 224. art. 4. There must be some mistake here; or in what courts are actions to be brought relating to real property exceeding 50 fr. a year, or personal property exceeding 1000 fr. in value? We have always understood that the courts of first instance have jurisdiction over all causes not assigned to the *juges de paix*, or the *tribunaux de commerce*; and so we find upon enquiry.

<sup>2</sup> Rey, vol. i. 227. vol. ii. 163.

<sup>3</sup> The decisions of the *juges de paix* are termed *sentences*, — of the courts of first instance *jugemens*, — of the courts of appeal and the court of cassation *arrêts*.

<sup>4</sup> Miller, p. 433.

that though many abuses have crept in, the court is still superior to any thing which other nations have adopted in its stead.

There are 360 tribunals of the first instance, one for each *arrondissement*; the number of judges in each varying from three to 56. There are 26 *cours royales*; the number of judges in each varying from 20 to 50. The *cour de cassation* consists of a first president, three presidents, and 45 judges, and is distributed into three sections. The courts of the first instance are most commonly divided into chambers, according to the wants of the *arrondissement*. That of Paris has seven. All the *cours royales* are divided in the same manner. At Ajaccio in Corsica, for instance, there are two chambers; at Paris six. The salaries of the ordinary judges of the courts of the first instance vary from 50*l.* a year to £240; those of the presidents from 600*l.* to 1440*l.*; of the ordinary judges of the *cours royales* from 168*l.* to 320*l.*; and the presidents have a fourth more than the ordinary judges, and the first presidents from 600*l.* to 1440*l.* per annum. In the *cour de cassation* the first president has 1200*l.*, the presidents 1000*l.*, and the ordinary judges 600*l.* a year. The emoluments of the Chancellor of France amount to about 12,000*l.* a year.<sup>1</sup>

In the *bureau de conciliation*, and the court of commerce regular attornies are not admitted, but the prohibition has been generally evaded.<sup>2</sup> Before the *juge de paix* attorneys *may*, in the courts of the first instance and of appeal they *must*, be employed; and there are a fixed number admitted in each court who enjoy a monopoly of the practice. In the court of cassation the functions of the barrister and attorney are combined, or more correctly speaking, the proceedings are drawn and conducted, and the case argued, by advocates exclusively.

The French courts have also public officers attached to them, under the name of *la ministère public*, to whom all causes in which the public may be supposed to have an interest or married women and minors are concerned, with several others enumerated in the code of procedure,<sup>3</sup> must be com-

<sup>1</sup> These particulars, as to the number and pay of the judges, are taken from Miller, chap. 3. sect. 2.

<sup>2</sup> Rey, vol. i. 224. The *avoué* merely manages suits; he has nothing to do with conveyancing.

<sup>3</sup> Code de Proc. Civ. liv. ii. tit. 4.

municated. There are altogether about 45,000 of these. When we add that the French judges are answerable in damages for delay and misdecision, our readers are in possession of the most prominent features of the judicial system of France, and may see at a glance its numerous inconveniences. The excessive number of judges and officers, the paltry rate of remuneration, and the facilities for combination afforded to practitioners by attaching a certain number to each court, are faults it is impossible to palliate; and we can hardly conceive the lower order of judges inspiring a much greater portion of respect than was enjoyed by the judicial dignitary mentioned by Boccaccio, whose inexpressibles were abstracted from his person by way of joke whilst a cause was actually in progress before him.<sup>1</sup> Strong reasons might be adduced against making judges liable to be sued by dissatisfied suitors; as tending to degrade the order without any commensurate advantage. It is submitted that such a liability may fetter a well-disposed judge, but forms no check upon a bad one; who may easily enough find a way to be partial or oppressive without departing from the letter of the law or proveably exceeding his authority. The universal vagueness, too, with which jurisdiction is marked out and particular modes of proceeding assigned, might be made the ground of an objection.

On these defects, however, we do not wish to dwell, since they are neither inherent in the present; nor unavoidable in any future plan. We are anxious to improve by inquiry, and not merely to retort on an antagonist. Instead, therefore, of comparing the actual state of the two countries in point of judicial organization, let us compare their capabilities for reform; instead of criticising the irregularities of the superstructure, let us see which of them has laid the best foundation. On any other principle we shall scarce avoid fixing on things external and adventitious. The evils, for instance, of local judicature are comparative ignorance, want of respect, and liability to prejudice and corruption; evils, which the low pay and excessive number of French judges have an evident tendency to aggravate. The charge against the circuit system is chiefly founded on the additional delay and expence; which certainly become almost intolerable when, as at present, causes are frequently postponed from assize to assize for want of time to try

<sup>1</sup> Decameron, 8th day, 5 Nov.



them, and the press of business is confessedly too much for the courts. Were, then, an Englishman and a Frenchman disputing on the advantages enjoyed by each in respect of the administration of justice, no satisfactory result could be arrived at by invidious reflections on these particular inconveniences; each might succeed in fixing a stigma, but would be quite unable to parry the retort. The French, again, have a much greater extent of territory, without so many facilities of communication. Metropolitan law, therefore, might be meted out to us, though it would be impossible to distribute it to them, on account of the distance a Parisian judge would have to travel. This is a particular in which we differ not merely from France, but from almost every nation on the continent whose institutions are worth discussing; and it would be well for foreign writers to reflect upon it before they come with preconceived opinions to pass judgment on our establishments. M. Rey expresses surprise at the certainly anomalous experiment which our circuit system exhibits to the world, and easily enough finds out the faults of it, lying as they do upon the surface for those who run to read; but he seems to know nothing of the benefits which Englishmen in general have been wont to make matter of self-gratulation. M. Meyer, too, has named it in his chapter of defects,<sup>1</sup> and we trust, therefore, that our readers will pardon us for taking up a page or two with an exposition of those benefits.

No mild and temperate reformer, it is true, no man of standing in the country, no legal authority nor philosophical jurist whom the public are likely to regard, has yet ventured to speculate on the expediency of breaking up the metropolitan courts, and making a regular distribution. Plans, however, have been plausibly set forth, and one writer in a respectable publication has even gone so far as to map out a new set of jurisdictions, with judges, salaries, and every suitable appendage;<sup>2</sup> and as this scheme is apparently the result of calculation and inquiry, is modelled with great precision, and free from the extravagance of the school in which the author professes to enrol himself, we are willing to view it in the light of a practical illustration of the probable consequences of change.

<sup>1</sup> Liv. iii. chap. 21. *Defauts des lois Anglais.*

<sup>2</sup> See the Jurist, No. IV. Art. V.

Let us then for the sake of argument suppose, with the writer, about 90 or 100 courts of co-ordinate authority distributed throughout the country, with all possible attention to the thinness and density of population and the wealth and poverty of districts. Let Yorkshire, for instance, have nine, (at Halifax, Sheffield, Leeds, Wakefield, Ripon, York, Hull, Whitby, and Scarborough); Lancashire five, (at Manchester, Liverpool, Preston, Lancaster, and Wigan); Lincolnshire and Devonshire four each; and the other counties in proportion. The courts at Westminster will be retained, and from six to twelve district courts of superior dignity to the other district courts erected at convenient distances, to which any cause involving property beyond a fixed amount in value (say 500*l.*) might be removed. A single judge is to sit in each court with both equitable and legal jurisdiction, and there is to be but one stage of appeal to a supreme central court.

The author of this notable project saves himself the trouble of defending it at length, by fairly avowing its incompatibility with the existing laws and forms of procedure, and thereby placing between an adversary and himself a boundless arena of contention. He vindicates himself, however, in the matter of expence, a ground we readily concede, and throw out a few random remarks from which a shrewd guess at the nature of his expectations may be formed. The looseness and inaccuracy of these are almost inconceivable, and we are under the necessity of noticing them to show the blunders of the plan.

The degradation of both bench and bar is certainly the first effect we should anticipate; but the writer assures us that the greatly overstocked bar of the capital would soon disperse itself over the country, and leave no deficiency of advocates; that his scheme does not of necessity embrace any change in the organization of the great courts at Westminster, "although," says he, "it is probable that there also extensive and very beneficial alterations would gradually suggest themselves, and force their way to adoption. The only consequence which would at first follow is, that the judges having no longer to go circuits, would be enabled to sit constantly and without interruption to the regular discharge of their duties."<sup>1</sup> Is that indeed the only consequence? Will a structure continue to stand when the supporting columns are struck from under it?

<sup>1</sup> Jurist, No. IV. p. 98.

Can a living body be sustained in vigour when the sources of vitality are gone? If so, the reviewer may be right, which nothing less than a miracle can make him. The English bar owes its weight and respectability entirely to the concentration of the courts. It is solely because the principal law-business of the kingdom is brought to a focus, that the study of jurisprudence holds out a sufficient inducement to men of fine talents and finished education; and that the profession has been elevated to the high station which it occupies. From such a body as the present bar, the crown has always the power of selecting fit members for the bench, and is able to scrutinise their pretensions with nicety, because it wants but few; and, though the choice has frequently been influenced by party feelings, it has never of late been so grossly perverted as to fix on a mere tool of authority. We have at any rate the best possible securities; for judges are not made *en masse*, nor sent to minister in holes and corners. The whole kingdom is alive to an appointment, because every part of it may suffer by a wrong one; and there is certainly no fear at present of the judges being influenced by local habits, nor of meanness and servility in the counsel. They act and re-act upon each other; and a proper tone of feeling is also reciprocated by and to another equally important class. The English attorney is very far superior to the *avoué* of France, very far superior to what he would become in the event of the projected change. The vast importance of keeping up the character it were ignorance to deny. “*Quel malheur si cet officier manque de lumières ou de délicatesse; s’il flatte la passion d’un client; s’il lui montre comme certain un succès presque toujours douteux et souvent impossible; s’il le pousse enfin dans l’abîme d’un mauvais procès! Oh! combien de ruines consommées par la perfidie ou par l’ignorance d’un premier conseil!*”<sup>1</sup>

Let us now reverse the picture. When a hundred judges are to be chosen instead of twelve, inferior men must be placed upon the bench, and the judicial order would unavoidably degenerate, though the same materials for framing it were left. But these also would instantly fail: the London bar would not be, as is supposed, distributed, but *ipso facto* de-

<sup>1</sup> Exposé des Motifs de Code de Proc. Civ. Par M. Treilhard.

stroyed ; no longer affording the same means of wealth and elevation, it could not be so respectably supplied, nor allow of that division of labour, that exclusive attention to particular heads of law, now in use amongst us, and which contributes far more than is commonly supposed towards keeping decisions uniform and preventing litigation by excluding doubt. In Ireland at the present time all branches of jurisprudence (common and criminal law, equity, pleading, and conveyancing) are followed contemporaneously by the same advocates, the reason alleged for the practice being the insufficiency of any one court to support a separate bar ; and it is almost unnecessary to state that good lawyers are rather scarce amongst the Irish ; who place hardly any reliance on their own precedents, have scarce a text book of their own, and depend in fact for every thing on us.<sup>1</sup> By professing every branch in the same manner, some few practitioners in our larger courts might derive considerable incomes ; but though wealthy places might have a choice of advocates and well-salaried and well-filled tribunals, inferior departments must put up with inferior accommodation. An equal distribution of justice is out of the question. You could not put Bodmin on a level with London, as the London judge must see more practice, and receive a higher salary ; and the result is dissatisfaction on the part of the provinces, and great mischief eventually to the kingdom at large ; for what mischief more fatal can there be than the uncertain tenure of property and the check upon perfect freedom of intercourse which ensue on a shifting and vacillating jurisprudence ? Considering English law as a law of precedent and authority, we cannot think such apprehensions vain. Authorities very rapidly diverge when the sources of knowledge are distracting by variety, and precedents soon lose their weight when too many heads are employed in making them.

But this objection we are not to urge, because a good code would form an answer to it. A small number of judges assembling at the same place, and deliberating together on all points of difficulty, and the presence of the same practitioners at the sittings of all the courts alternately, freely communicating and canvassing opinions,—these are advantages essential possibly to the very

<sup>1</sup> Lord Redesdale's decisions, reported by Schoales and Lefroy, are an exception.

sceptical. Some few of these we have given in a note <sup>1</sup>; they are not on trifling matters, and many of them are maintained in direct defiance of the court of cassation and even of the pro-

<sup>1</sup> Un jugement en dernier ressort qui violerait *ouvertement* la convention formelle des parties donnerait-il ouverture à la cassation ? (Art. 1134 du Cod. 104.) La jurisprudence de la cour régulatrice a longtemps varié sur cette importante question ; mais la négative est aujourd'hui incontestable. Introd. à la Pratique, &c. p. 13. Ed. 1824.)

Quel est l'effet de ces conventions ? (conventions in the Bureau de Conciliation.) Elles ont, dit l'art. 54 du Code de procédure civile, la force d'*obligation privée*. MM. Pigeau, Tarrible, Merlin, Carré, estiment que le procès verbal de conciliation est un acte *authentique*, mais qu'il ne produit point d'hypothèque. M. Berriat Saint-Prix résiste à l'influence de ces autorités imposantes ; il soutient que non-seulement le procès verbal de conciliation ne peut produire hypothèque, mais même que ce n'est point un acte authentique ; et il faut convenir que les motifs qu'il donne à l'appui de son opinion ne sont pas sans force. Id. 29.

Le défaut de conciliation peut-il être suppléé d'*office* par le juge, comme étant une exception d'ordre public ? Oui (MM. Merlin, Cerriat, Pigeau) ; non (Pigeau, édit. de 1811 ; Cassation, 3 Juillet, 1812, 30 Janvier, 1816 : M. Carré.) Dans le doute, [i. e. against two decisions of the supreme court,] dit H. Berriat Saint-Prix, il faut décider pour la conciliation.

La vérification [of written testimony] doit être ordonnée d'*office* ? Oui (Cass. 10 Juillet, 1816) ; non (M. Berriat.)

Pour faire courir les intérêts, [on a debt sued for] est-il nécessaire d'y conclure spécialement ? Oui ; la demande du *principal* ne fait pas courir les intérêts. (M. Touillier, Voy. l'Art. 1207, du Code Civ.) C'est aussi l'avis de MM. Merlin et Berriat. M. Delvincourt est d'un avis contraire ; il cite Ricard à l'appui de son opinion. Id. 40.

L'avoué constitué tient-il de la *simple remise des pièces* un mandat suffisant pour faire tous les actes pour les quels la loi n'exige point un *pouvoir special* ? Non, (Demiau Crouzilhac.) Oui, (Pothier, Pigeau, M. Carré.)

La partie défaillante peut elle, audience tenante, faire *rabattre*, c'est-à-dire supprimer le défaut ? Non, suivant M. Demiau Crouzilhac. Cette opinion, contraire à l'ordonnance de 1667, n'est point suivie dans la pratique. Id. 66.

Une partie pourrait-elle charger de sa défense une autre personne qu'un avocat, ou à son défaut un avoué ? Oui, (MN. Lepage, Commaille) ; Non (M. Carré.)

La mise d'une affaire en délibéré termine-t-elle irrévocablement l'instruction de manière que la cause ne pourrait plus recevoir les demandes incidentes dont elle serait susceptible ? M. Pigeau se prononce pour la négative. C'est aussi la doctrine enseignée par le Répertoire et Danizaat. M. Carré distingue entre le délibéré avec ou sans rapport. Dans la premier cas, l'instruction est, selon lui, terminée ; dans le deuxième cas, *secus*.

Les tribunaux peuvent-ils ordonner, l'exécution provisoire, nonobstant appel ou opposition d'un jugement qui annulerait un emprisonnement ou prononcerait l'élargissement d'un débiteur ? Oui, (M. Demiau Crouzilhac) ; Non, (M. Carré.)

L'opposition est-elle recevable après le délai de vingt-quatre heures ? Non suivant M. Delaporte et les autres des Annales du notariat ; oui, suivant M. Carré, dont l'opinion doit être suivie. La cour de Rennes s'était déjà prononcée pour l'affirmative, par arrêt du 10 Juillet, 1808. Id. 102.

En quel cas un mari peut-il être condamné aux dépens d'un procès qui intéresse sa femme ? [In the silence of the code M. Pigeau and M. Carré support different opinions.]

Si le jugement avait omis de prononcer sur les dépens, la partie qui a gagné sa

visions of the code. The charge, we know, has been indignantly repelled<sup>1</sup>; but facts are stubborn things, and we confess ourselves unable to get over them. We find high authorities conflicting as to the construction of points of daily application; and can we, with such samples before us, be expected to take upon trust what we have not as yet been able to estimate so fully? Are we to believe, that, unable as the French legislature has shewn itself to prevent misconstruction and uncertainty in those parts of the system over which lawgivers exercise the most immediate control, it has effectually provided against those abuses in judicature which arise from the ever-varying characters, dispositions, habits and opinions of men?

Thus the code of procedure frequently confers the power of altering and modifying rules of practice. In cases of emergency the time for appearance and pleading may be curtailed by the judge, additional instruction called for, trials hastened or delayed, and the execution of a judgment ordered on the instant, without allowing the usual time. The mode of conducting trials, of viewing certain topics, and treating certain causes of complaint, must always in some sort remain discretionary; and here again occasions present themselves on which leanings may appear, and prejudices break out. Such openings are left in every country in the world; and, not to go abroad for an example, we may venture to mention as an illustration of our meaning the antipathy to libellers which the present chief justice of the Common Pleas is supposed to entertain. The supposition may or may not be well grounded; his lordship has certainly received provocation enough to justify a strong feeling on the subject, for few men have been more illiberally assailed. At any rate its existence is believed in, and we have known an action against a newspaper commenced in his court, and the *venue* laid in London, for the avowed purpose of benefiting by the prejudice. We mention the fact to show the danger of so organizing courts of justice as to render it easy to form such calculations; and surely we are justified in supposing that

cause pourrait-elle contraindre son adversaire à les payer? Oui, (M. Demiau Crouzilhac); non, (MM. Lepage, Carré.) Id. 144.

Many more instances might be culled with ease. We cite them, not in the belief that these or double the number will prove the French code to be positively bad, but merely to show the difficulty of anticipating contingencies, and how much after all must be left to the discretion of the judges.

<sup>1</sup> By Dupin. See the work entitled *De la Jurisprudence des Arrêts*.

the French judges are not superior to weaknesses which the best and wisest of mankind confess. If they are so, we retire from the comparison; and, without endeavouring to disprove their claims, we shall proceed to show, by a complete example, that the self-same establishments our neighbours are exulting in, would never thrive with us.

The judicial organization of Wales has recently become the subject of very general complaint. What are its defects? The despised jurisdiction, the suspicion of partiality, the conflicting practice! Insufficient judges appointed by the government, because in a great measure out of view of the public at large;—so few barristers of ability attending on account of the narrowness of the field, that the plaintiff may easily secure a certain advantage by retaining one or two leaders;—and attorneys, on the contrary, so abounding by reason of the low rank they hold in the principality, and the cheapness of the very inferior education they receive—so ignorant from their limited practice, and so needy and rapacious withal, that no suit is ever dropped for want of care in fostering, no angry feelings are permitted to subside, and a greater crop of litigation is produced on a given extent of territory than four times the space in England would bear.<sup>1</sup>

Several of these defects are eloquently exposed by Mr. Brougham.

“But a second and greater objection” (his first was the comparative incapacity of the judge) “is that they never change their circuit. One of them for instance goes the Carmarthen circuit, another the Brecon circuit, and a third the Chester circuit, but always the same circuit. And what is the inevitable consequence? Why they become acquainted with the gentry, the magistrates, almost with the tradesmen of each district, the very witnesses who come before them, and intimately with the practitioners, whether counsel or attorneys. The names, the faces, the characters, the histories, of all those persons are familiar to them, and out of this too great knowledge grow likings and prejudices which never can by any possibility cast a shadow across the open, broad, and pure path of the judges of Westminster Hall.”<sup>2</sup>

The excellent publication of Lord Cawdor bears ample testimony to the truth of Mr. Brougham’s remarks, and the ex-

<sup>1</sup> See a Letter to Lord Lyndhurst on the Administration of Justice in Wales, by Earl Cawdor. Ridgway, 1828.

<sup>2</sup> Speech, p. 21, 22.

istence of the evils we have mentioned, along with many more.

Remarkable it is, that all these are directly or indirectly attributable to the insulated nature of the establishment; to the want of a common centre of communication; to the degradation of the practitioners by the pettiness of the courts, and the absence of a public sufficiently large to silence the clamours of those who are interested to perpetuate abuses; and still more remarkable, that the parts in which the Welch arrangements most nearly resemble the beau ideal of the (*soi disant*) philosophical jurists, are precisely those which first caused the infection, and have carried corruption to the core.

If judges, then, residing the greater part of the year in England, can form injurious local intimacies amidst the press of employment and the hurry of travel; if men, bred up together in the English courts, and grounded there in principles common to all, are found establishing different regulations, and acting upon different views the moment they are estranged from their fellows; if pettifoggers multiply where law charges are too low for gentlemen, and abuses are more easily upheld when merely affecting a department;—if these evils do exist already, what is to save us from a tenfold aggravation of them, when the judge lives all the year round amongst the suitors of his court, after receiving possibly a provincial education; when the whole agency of justice has been deteriorated, and advocates and solicitors enjoy a monopoly? For a monopoly they certainly would have, though not formally recognised as in France; since, from an intimate acquaintance with the rules of their own court and the habits of their own judge, they would possess a decisive advantage over any interloping stranger.

Remarkable, again, it is, that in no single instance has our system departed from the principles we are advocating, without introducing an inconvenience or defect, without checking the play of the machinery, or striking off some useful part of it; and scarce an aberration can be named which does not hold out a warning against the scheme in question. We are not acquainted with one local jurisdiction which is not the worse by reason of its locality. The abuses of the county courts, the courts palatine, and the



ecclesiastical courts, we could prove unanswerably, and will do so ere long. What respect minor tribunals are likely to inspire, may be guessed at from the degree of respect in which the commissioners of bankruptcy and insolvency are held, and the strange scenes which now and then occur in the inferior courts; and if the Common Pleas is occasionally out of order, the circumstances may be traced to the monopoly; to the want of a shifting attendance of counsel, and the approach to equality between the bench and the bar, there occasioned by the elevation of the latter but equally producible by degrading both. It is almost unnecessary to add, that the power of calculating on a chief justice's predilection or antipathy is conferred by the enactment that he alone should sit in London and Middlesex, instead of taking his turn with his brethren; and that the discrepancy in the practice of the King's Bench, Common Pleas and Exchequer, so fraught with risk and embarrassment, and the conflicting decisions which form the stigma of our law, are the result of varying opinions and unequal knowledge under circumstances peculiarly favorable to consistency. "These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected, and their judgments blended together, as they are interchangeably courts of appeal or advice to each other."<sup>1</sup> Yet even they have chanced to differ, and the public and the government have promoted their differences, by making the King's Bench a favorite, by taking more care of its dignity, and paying more attention to its deeds.

Need we make the application? Need we shew by nice deduction, the widening of the breach, the heightening of the partition, the rapid diffusion of the taint, which must very soon take place, should we fix our judges at a distance from each other, and make each the centre of a petty system: should we purposely exclude that concentration of mind, the results of which are universally admired, "*qui ait pu maintenir uniforme cette celebre loi commune qu' invoquent tous les jurisconsultes Anglais, et qui sans exister nulle-part, sans etre consignée dans aucun recueil, dirige avec une fermeté invariable*

<sup>1</sup> Black. Com. vol. iii. 356.

*sur tous les grands points de droit les arrêts des cours Anglaises depuis plusieurs siècles ?”*<sup>1</sup>

Under the new scheme, we repeat, it will be impossible to prevent gross disparity. Adopt Bentham's suggestions : make the courts of neighbouring districts co-ordinate, and some one of them would acquire a preference from the character of the judge or the superiority of the advocates ; whilst, on the other hand, if the power of selection be denied, suitors restricted to the less reputable tribunal will always be murmuring, and with reason, at the inequality.

‘ Why should Wales, because it happens to be a principality, be placed below the rest of the kingdom in point of judicial organization ?’ is the exclamation now.\* ‘ Why should London, because it happens to be a metropolis, be placed above the rest of the kingdom ? why should Liverpool ? why should Manchester ? why should Birmingham ?’—will be the cry hereafter. Because they have commerce, wealth, and population. These are principles of attraction whose force you cannot neutralise : the better bar, the better bench will fly to them. Shall we then make no effort to diffuse the benefit ? Shall we suffer these overgrown towns to keep to themselves (what Mr. Bentham terms) the ribs and sirloins of justice, leaving the neck beef and sticking pieces to the poorer districts ? Were we to do this, even they themselves would have little cause for exultation. To be pure and permanent, decisions must flow on together ; and law, administered by petty local judges, is hourly verging to decay. It is suspected by cotemporaries, and useless to posterity ; for besides the forfeiture of present confidence, it loses the supply of authentic precedents, which are the best and soundest materials for legislation, and, whether we do or do not set out with a code, are continually needed to keep up with the progress of society, and retain the system on a level with the times.

We have said thus much to lessen the confidence which plausible scheming occasionally inspires. Yet admiring as we do the groundwork of our system, let us not be supposed capable of attempting a defence of it as it stands. The judges are clearly unequal to the work required of them ; partly from bad management, and partly from

<sup>1</sup> Meyer, tome ii. c. 16.

\* Mr. Brougham's Speech, 21.

physical incapacity. Should a fresh partition of judicial duty be made, and the full strength of the corps brought into play, they would scarce be able to satisfy the country; in the absence of systematic arrangement, so evident at present, the evils of the deficiency are glaringly increased. This deficiency, therefore, must be supplied; if possible, without removing a landmark; but, at any rate, supplied without delay. We must no longer expose suitors to the chance of seeing their cases made *remanets* after all the expense of preparation is incurred. We must no longer permit the chief justice of the King's Bench to undergo exertions as praise-worthy as they are unprecedented whilst the barons of the Exchequer are dozing on their cushions; to wear out his health and shorten the period for which his invaluable services may otherwise be had, in the endeavour, vain after all, to bear up against a load which allows nor stop nor stay; which comes down upon him with added weight, whenever he takes a moment for breathing time or turns aside to other equally indispensable and equally accumulating duties. In the seven years, 1820 to 1826 inclusive, the number of cases decided in the King's Bench was 13,379; in the Common Pleas, 3902; in the Exchequer, reckoning causes of all descriptions (equity, common law, and crown cases), only 1346. This statement, taken from the parliamentary returns, is conclusive. The disparity, indeed, is too notorious for denial, and so also are the causes of it.

With regard to the Exchequer, the double capacity of the judges is highly injurious to their character. By dealing with all sorts of law and equity, they become exposed to the suspicion, not altogether groundless, of excelling in neither. In the next place four sworn attorneys and sixteen clerks enjoy a monopoly of the business, and as one of these must be employed, an attorney not of the number naturally enough prefers suing in another court to giving up a portion of his fees, which he would be under the necessity of doing should he select the Exchequer.

In the Common Pleas, the custom of requiring certain disbursements at an early stage of the cause, operates in some measure to its disadvantage, and there are some further peculiarities of practice of a like tendency; but the prominent mischief is the institution of the coif. Solicitors are frequently

partial to particular advocates ; the suitors are so too ; and neither are so willing to enter a court in which their freedom of choice is restricted. The exclusive right of the serjeants does not, indeed, extend beyond the term, and any advocate may conduct a Common Pleas cause at *nisi prius* ; but all applications to the court (motions for new trials, in arrest of judgment, &c. &c.) must be made by the serjeants, and the junior counsel who, from greater leisure, is generally much more conversant with both the facts of the case, and the authorities bearing upon it than his senior, is not permitted to speak. Some inconvenience must be the consequence, even when a serjeant is employed to conduct the trial ; but should any other counsel have been retained originally, and an application to the court be required, the serjeant, who is feed for this single step, cannot be expected to come to the discussion so well prepared as if he had been engaged throughout. Besides, this court has no jurisdiction over the counties palatine of Chester, Durham and Lancaster ; and Lancaster alone frequently produces more causes than all the counties of a minor circuit put together.

Such are the leading circumstances which first gave the King's Bench the start of its competitors, and the superiority thus acquired has for obvious reasons gone on increasing ; great care being uniformly taken in selecting the members of a bench to which the public attention was more particularly directed ; whilst the Common Pleas has been less scrupulously supplied, and the Exchequer not unfrequently made a resting place for age and infirmity, or the reward of political subserviency.

We are not aware of any reason whatever for retaining the points of difference we have enumerated. So long ago as 1825, a proposition was made for creating a vice-chancellor of the Exchequer, in whom the equitable jurisdiction should be reposed ; and now that chancery matters seem verging to a crisis, the plan, or something like it, will probably be adopted. Assuredly no equity judge should be sent upon the circuit ; for to say nothing of his evident unfitness to superintend *nisi prius* and criminal trials, the most injurious consequences result from his absence from duty three or four months in the year, in addition to the vaca-

tion ; there being always applications to be disposed of, and orders and injunctions not admitting of postponement to be made. Let then a proper number of courts, in aid of the chancellor, be formed complete within themselves ; and instead of taking, as is commonly the case, a chief baron from the chancery bar to make a bad *nisi prius* and an irregular equity judge, let the Exchequer act for the future as a court of law, and the barons be chosen with reference to the change. The home secretary declared some time since that he looked with favour on the proposal, made by Dr. Lushington, of throwing open the court of Exchequer to attornies. Of that, therefore, it is unnecessary to speak, unless it were for the purpose of refreshing the right honourable gentleman's memory and inquiring the cause of the delay.

With regard to the learned brotherhood of the coif, the legal monachism, as Mr. Miller calls it, some doubt was expressed by Mr. Peel ; but very little, we believe, exists in the profession. The mode of admission to the fraternity is a heavy expence, and a somewhat invidious exercise of authority. The leading members gain next to nothing by the monopoly, as they could command by talent as much practice as they have ; and as for the rest, we cannot think that their property in the privilege is of sufficient value or of such a tenure as to stand in the way of a necessary alteration. The only set of men who would be hurt are those who now get fees for unimportant business from attorneys who prefer them to the other serjeants, but would not prefer them to other members of the bar. A class like this, if any such exists, is hardly worth considering. We hardly know how compensation could be adjusted ; but we really think that if the fees of entrance were repaid by the public, scarcely one of the learned body would complain ; as their precedence, the main object of the greater part, need not be meddled with.

The practice of the Common Pleas with regard to the payment of fees might be altered without any difficulty, and then no impediment will remain to an equal division of practice ; and taking for granted that the government will henceforth be careful to place the most deserving on the bench, in whatever court the vacancy occurs, we may fairly calculate on having

twelve judges of acknowledged ability exclusively devoted to the common law courts, and so co-operating as to give to each his share of duty and call forth the full energies of all. If, notwithstanding precautionary measures, an undue proportion of causes should be set down for trial in any one court, the overplus of the town causes may be transferred to another, paying due regard to the state of its arrears. The excess of country causes will be of little importance; these, wherever brought, being heard at the assizes, and merely the incidental business appertaining to the tribunal in which the suit was commenced.

To bring the circuits more nearly on a level, and dispatch the business of the country with ease to the judge, and satisfaction to the suitor, will require a still further arrangement. More judges must be had for law as well as equity, and the circuits must be greatly modified, if not mapped out anew. It is hardly possible, nor perhaps altogether expedient, to make an exact partition; but no one can pretend to justify the great existing disproportion.

Wales, too, cannot long be left in so miserable a state as now; and placing it within the range of the English courts is the remedy most obvious and most generally approved. Lord Cawdor proposes to divide the Oxford circuit into two; to one of which South Wales, to the other North Wales, might be annexed; to take Lancaster from the Northern circuit, and add Oxford to the Midland.<sup>1</sup> His objection to making Wales one circuit (as proposed by Lord Colchester) is, that the expence of travelling, and the small quantity of business, would make it an inferior circuit, which few counsel would attend. But can his Lordship be ignorant that counsel frequently go one part of a circuit, and omit the rest; and that attaching Wales to the English circuit is, therefore, no security whatever against the dreaded desertion. The plan, however, deserves consideration, which it is the

<sup>1</sup> The two new circuits would then stand thus:

Lancashire	Gloucestershire
Cheshire	Herefordshire
Shropshire	Worcestershire
Staffordshire	Monmouthshire
North Wales	South Wales.

His Lordship also proposes to divide Yorkshire, and hold assizes for the West Riding at Leeds.

duty of the ministry and the commissioners to give. On whatever principle the new allotment may be made, the number of judges in each court should be forthwith increased to five. Lord Cawdor's scheme would require two new judges ; but no one can doubt that, not to mention the advantage of a casting vote, ample employment might be found for three. There is no fear of reducing the order to that happy state described by Fortescue, when the King's Bench was only open from 8 in the morning to 11 in the forenoon, when the judges "after taking their refreshments, spent the rest of the day in the study of the laws, reading of the holy scriptures, and other innocent amusements at their pleasure."<sup>1</sup> We do not require that their life should be "rather a life of contemplation than much exertion ;"<sup>2</sup> but it should neither frighten away by intensity of toil the men most fitted to adorn it, nor render the task of satisfying the public an entirely hopeless one. And far better would it be to let an extra judge be idle occasionally, than be compelled to hire some private practitioner, not always the best qualified for the post, to discharge the duties of any member of the bench who may chance to be incapacitated by sickness from attending the assizes. "It is poor economy and worse policy. It never succeeds to see a man one week on the bench and another at the bar. It is an union of characters which the public neither approves nor comprehends, and in this instance their judgement is right, though they may not always be able to assign the reasons for it."<sup>3</sup>

We are also fully aware of the weight of Mr. Miller's arguments against the present practice of detaching judges to extraneous duties (at chambers, in the bail court, the house of lords, &c.) during the regular sittings of the courts ; and the division of the King's Bench, the chief justice sitting in the regular court and the puny judges apart, is also highly objectionable.<sup>4</sup> Such measures have a tendency to raise surmises in the minds of those whose causes are decided in a diminished court, to distract the attention of the judges themselves, and lead to the conclusion that their number is a matter of indifference.<sup>5</sup>

<sup>1</sup> Fortescue *De Laudibus*, &c. cap. 51.

<sup>2</sup> *Ibid.*

<sup>3</sup> Miller, 461.

<sup>4</sup> Mr. Brougham's Speech, p. 10 & 11.

<sup>5</sup> Miller.

It will be found that these defects are by no means inherent. An inferior judge may be trusted with the justification of bail, even should the law of arrest remain unmodified; and when the King's Bench practice is lightened of some portion of its load, chamber business may be transacted at other times than during the sittings of the court, which then, moreover, there will be no necessity for dividing.

There is also an anomaly which we shall notice here, though the legal division of time belongs more strictly to the head of practice. The summer circuit may be advanced a month or five weeks one year, and retarded as long the next; because, forsooth, the festival of Easter is made dependent on the moon; a mode of proceeding which one would hardly have expected to have seen survive the first quarter of the nineteenth century, and which we hope to see abolished at the very next meeting of the legislature. We are, indeed, particularly anxious to do as much as possible towards reforming the legal mode of calculation, as this is a point in which no nation in the world is so miserably deficient. We are quite aware of the difficulties of alteration now, and what a mass of rules and decisions are involved; but we are not on that account to varnish over or try to palliate absurdity. A summons requiring an appearance within so many days of, from, after, or on, St. Hilary, St. Martin, Easter, the Purification, the Morrow of All Souls, or the Morrow of the Holy Trinity, instead of specifying the day of the month intended, can serve no purpose but puzzling the party, and benefit no class of society except the venders of almanacks. Nor do we say this from a mere wish to simplify, though simplification is certainly improvement. This style of calculating is often tantamount to a denial of right, and often convertible into an instrument of oppression. If injured at the end of June, a man must wait five months for an answer to his complaint; if at the beginning of November, he may get one in a fortnight: in the one case the defendant has hardly fair notice; in the other the debtor has more time for preparation than any notions of convenience can require. There must be times for business and times for relaxation: lawyers require rest as much as other people, and other people are interested in indulging them. "It is the foolishness of vulgar errors to suppose, that, by how much the more you vex



and harass the professors of the law, by so much the more you benefit the country. The fact is quite the reverse; for by these means you make inferior men, both in rank, in feelings, and in accomplishments, alone follow that profession out of which the judges of the land must be appointed.”<sup>1</sup> Even a long vacation might, therefore, be advisable, but the present arrangement is utterly indefensible.

The almanack for the present year gives the following result: Term of 20 days—Vacation of about 10 weeks—Term of 4 weeks—Vacation of 17 days—Term of 19 days—Vacation of 18 weeks—Term of 22 days—Vacation of about 10 weeks. Is the length of any of the intervening periods nicely accommodated to the ebb and flow of business? Is there any reason for separating Michaelmas and Hilary Terms by a ten weeks’ interval, and Easter and Trinity by less than three? Certainly not. Spaces of time must be occupied by the assizes, during which the London courts must close; but this is the only circumstance, always excepting the risk of departing from routine, which ought to check our career. In truth we have long been innovating in this matter, and encroaching on these venerable institutions. Witness the acts that have been passed to enable the judges to try causes in, and hear cases argued out of, Term. A more sweeping adjustment may by and by be practicable. Until it is made we shall be under the necessity of acknowledging one palpable point of inferiority to the French. We do not envy them their symmetrical organization; we do not envy them their code; but we do envy them their mode of dating their proceedings, and parcelling out their business, because more easy, simple and consistent than our own. A partial imperfection in this respect is, we know, the price we must pay for the superior weight and all-pervading authority of our tribunals. Exert ourselves as we may, we cannot be so expeditious. The judges do not possess the gift of ubiquity, and cannot be hearing trials in the country and deciding points of pleading in town at the same time. We cannot ensure a suitor a tribunal always waiting his convenience, and ready at a moment’s warning; but we think it quite possible to keep the courts open often and long enough to obviate any glaring inconvenience; as

<sup>1</sup> Mr. Brougham’s Speech, p. 23.

process at any rate may be served in the interval, though no further proceeding can be had.

M. Meyer denies that the assizes materially diminish the expence occasioned by the concentration of the courts, because facts only are there inquired into.<sup>1</sup> He does not seem aware that we thereby reduce to its minimum, the charge of witnesses' and solicitors' attendance, the item principally affected by the distance or proximity of tribunals; since the expence of collecting and sifting evidence, drawing and copying pleadings and briefs, fees to counsel and fees of court, depend on very different considerations. It is true, indeed, that all incidental questions of law are discussed in town; that the process issues, that the pleadings are conducted, judgments given and arrested, and new trials moved for there; and yet without presupposing the degradation of practitioners, we cannot conceive why these steps should be much dearer in metropolitan than in local courts. A London attorney acting for himself charges as high as a country attorney, though the latter is obliged to employ an agent. The reason is obvious. The country attorney procures the facts; the agent takes the steps required; and they share the fees, because they share the trouble. If there were provincial offices to which the provincial practitioner could resort, why, assuming him to be equally respectable, should he charge less than when he acts by proxy? It is a simple case of division of labour, and should be viewed in the same light as brokerage in trade, which rather tends to cheapen the commodity. We say this to strike the balance fairly. We know the advantage of immediate communication, and that the anxiety of parties often induces them to incur the expence of coming to town to be present at incidental discussions. But most causes pass smoothly off; a verdict settles every thing; and judging from the reports of the court of cassation, and the tedious ordeal French appeals must pass, we should hardly think our extraordinary hearings are much more harassing than theirs.

Admitting, however, that the balance of expence inclines against the present establishment, it stands as firm as ever; for we have long ago declared that we address its claims rather to those who look forward to posterity, than to those

<sup>1</sup> *Tom. ii.* p. 309.

whose thoughts are contracted to the hour. Granting, for the sake of argument, that a simple demand is more easily and cheaply recovered in a French or any local court, and that, whilst a code is fresh and new, no glaring inconsistencies are likely to appear; if it is the common course of uncommunicating tribunals to form different standards of right for different districts, besides degrading the courts and discrediting the profession, we should conceive that none but very narrow-minded lawgivers would purchase the temporary benefit at the price of ultimate confusion. Durability against cheapness; equal laws against variety; a dignified bench against a mean one; and fair practice against pettifoggery—such precisely is the state of the dispute between ourselves and the high authorities we are opposing.

But before we close the comparison we have still some imperfections to remove, which though not really involved in the constitution of the courts, are commonly attributed to a faultiness of construction in them. Such are the rules of practice, the complication and multiplicity of which it will soon be necessary to disentangle and reduce. To complete our intended sketch, we must not merely consider these, but patiently trace a suit from the commencement to the conclusion; contrasting, as we go along, the natural, the French, and the English methods of procedure, and carefully appropriating for our own improvement whatever good we may discover in the search. We shall of course examine the present law of costs, which includes no slight portion of absurdity; and, with relation to new trials and writs of error, we shall be obliged to canvass the principles of appellate jurisdictions, and point out the imperfections of our own. The expediency, too, of reducing the courts for the recovery of small debts to some show of uniformity, extending the powers of the county court, and imitating the *bureau de conciliation*, are subjects which cannot be passed by; but on every point not essential to the argument we shall be as brief as possible. Our object is to prove that the system in general is well worth preserving; that correctives for its aberrations may very easily be found; and that there is no cause whatever for that spirit of discontent which so many writers are eagerly diffusing. This, however, will be clear enough in the sequel, if

it was not long ago. We feel the disadvantage of being compelled to break off the inquiry, and the present is not, perhaps, the best point of division ; but from the space already occupied we really have no alternative, and here concludes the first portion of our task.

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#### ART. II.—STATE TRIALS.

*State Trials; or a Collection of the most interesting Trials prior to the Revolution of 1688, reviewed and illustrated.* By S. M. PHILLIPPS, Esq. London, 1826.

THOUGH high treason be the main subject of the following article, we frankly forewarn our professional readers that they will find it entirely barren of technical disquisition. We make no pretensions to antiquarian research, nor have attempted to fix the principle of decisions which, it is very obvious from the book before us, depended upon no principle but the will and pleasure of the courts. Treason has ever been the most indefinite of crimes, for definitions are fatal to the free will of sovereign power ; and this is, in truth, one of the gravest morals to be deduced from a perusal of the State Trials.

But our immediate object is rather historical than legal. We desire to interest the reader in some remarkable passages of the domestic annals of our country, and to impress upon him the painful but important truth, that good laws are among the latest fruits of civilization, and that virtuous judges are rarer patriots than heroes and orators.

The records of jurisprudence afford the richest materials for what is called the Philosophy of History. They draw away our attention from wars and politics, from kingcraft and priestcraft, to fix them upon scenes where human passions are the most dramatically displayed, and human interests the most deeply concerned ; where the hearts of men may be read in their actions, and our mortal nature viewed alternately in its brightest and its darkest colours. State Trials, moreover, throw a strong light upon what it is the most material object of history to ascertain—the moral condition

of the people — of the subjugated multitude ; and the State Trials of our own country, where liberty has maintained a constant struggle with prerogative, are on that account more interesting and important than those of perhaps any other country in the world.

The last and best edition of these valuable records, compiled with great labour and learning by Mr. Howel, is inaccessible to general readers by reason of its size and price. Mr. Phillipps, already advantageously known by his work upon Evidence, has rendered another service, not only to lawyers, but to all students of English history, by the two popular volumes now before us, the character and design of which we shall state from the Preface in his own words.

“ Every reader of the early State Trials must have often felt himself embarrassed by the prolixity and confusion in which the proceedings are involved. One who is not familiar with such subjects would frequently find himself bewildered ; and even a person conversant with legal investigations may sometimes require a clue to guide his course. One of the objects therefore of the present work has been, to give a clearer and more comprehensive view of the several cases, by retrenching what is superfluous and irrelevant, and reducing into order all that is material. The most difficult and important part of such an undertaking is, the inquiry after truth, and an impartial statement of the fair result of evidence. How far I may have succeeded in this part of my task, it will be for others to decide. Perhaps I may be allowed to say, that I have given to this inquiry all the consideration in my power, and that my first wish has been to exercise an unprejudiced and dispassionate judgment. It is hoped that some good purposes may be answered by bringing more fully before the public view cases which are of great celebrity, and intimately connected with the annals of our country. The study of the law is ennobled by an alliance with history. And the unprofessional reader may perhaps derive from a legal scrutiny more just ideas and more accurate information. There is scarcely one of the trials which does not exhibit some striking and affecting traits of character. Such traits abound in the case of Lord Stafford, in Lord Russell’s, in the Earl of Strafford’s, and in that of Algernon Sydney. Some

of the speeches also which were made by the accused in their own defence are distinguished by a very high and impassioned strain of eloquence.

“ But the most valuable information to be derived from the perusal of the *State Trials* relates to the administration of justice. We may there see how the law was dispensed in state prosecutions through a long series of ages. In the earlier periods, these proceedings were conducted without any regard to truth ; and it would be difficult to name a trial not marked by some violation of the first principles of criminal justice. If this view is dark in the distance, it is bright and consolatory in nearer time. Immediately after the revolution of 1688, our courts of justice acquired a new character, which has been advancing and improving to the present age. In comparing the two periods, which preceded and followed that event, and surveying the systems established before and afterwards, the contrast will appear most striking in these particulars : the deportment of the judges towards the accused, the tone and temper of their addresses to the jury, the practice in respect of the reception of evidence, and the exposition of the law of treason. In regard to this last particular, the reader will perceive (if I am not mistaken), from observations made in the course of the work, that some important doctrines have been laid down on the broadest and soundest principles, and most favourably to the subject, in the latest *State Trials* which have occurred.”

Now the importance of every one of these particulars we need not enlarge upon. There is a well-known remark of Hume, that the whole civil and military polity of Great Britain, the most complex in the world, her monarchy, her parliaments, her revenue, her fleets and armies, have each and all of them no other object than the support of the twelve judges ; meaning that the administration of justice between man and man is the one thing needful to the well-being of human society, and that all political institutions are useful only as they tend directly or indirectly to maintain the authority of the laws. If there is any truth in this, the purity of our courts is one of the first objects to which a patriot should direct his regard ; and though there is a specious

kind of philosophy which laughs at the schemes and the hopes of politicians, and would have us to look upon all modes of government as equally good or equally bad, yet surely we have cause to triumph in the successful struggles of our forefathers, and in our bloodless revolution, if the result has been the difference which Mr. Phillipps points out between the administration of justice before and after that memorable era.

When we say that the administration of justice is the best standard of national prosperity, we say what will hardly be disputed by any one who considers that the administration of justice means the *protection of rights*, and that since there can be no wrong done without the infringement of some right, if right could be perfectly protected, all social, and almost all moral, mischief would be banished from the world. The administration of justice, therefore, is the standard of public honour, and public virtue, and domestic freedom; and where honor and virtue and freedom are, there is little else to be desired that will not naturally follow in their train. But however just this philosophy may be, it is not the philosophy of the multitude. Superficial thinkers mistake the sources of public as well as of private happiness, and estimate the fortune of states, as of individuals, by the outward shew of wealth and majesty, and not by the solid foundations of equal rights, prosperous industry, and cheerful allegiance, on which alone an enduring superstructure can be raised. In popular parlance a nation is great and happy if her armies are victorious, her statesmen eloquent, her commerce extensive, and her revenues equal to the demands of government. Unthinking men take these for decisive signs of the times, and look no deeper; but they who have perused the history of nations know that political independence and civil liberty are two very different things, and that states, the most eminently distinguished for foreign conquest and national supremacy, may suffer under a domestic rod which is only the more cruel and oppressive because inflicted by the same hands that bear the sword of freedom against external foes. When the voice of the Cæsars was law from the Atlantic to the Euphrates, it was law, too, in the courts of Rome. While a Roman citizen might plead his mere name

and privilege against the jurisdiction of every foreign tribunal in the East and West, and North and South, he might plead in vain the laws of nature and justice and mercy before a tyrant at home: the slave held life and limb at the will of his master; and the gladiator bled and died for the amusement of the conquerors of the world. We must look behind the scenes if we would form a just judgment of the social condition of any people; and it may not be uninteresting, by a few extracts from the State Trials, to inform or to remind our readers in what manner our own country (while she was lifting her head proudly among the nations, and taking a lead among the rulers of the world) was accustomed to observe the weightier matters of the law.

1 *Mary*, April 17, 1554.—1 *Howel*, *St. Tr.* 870. .

“Sir Nicholas Throckmorton was charged with being engaged in the rebellion of Sir Thomas Wyatt. That rebellion, it is well known, broke out soon after the accession of Mary to the throne: and had for its cause or its pretext the projected union between the Queen and Philip of Spain. Throckmorton was tried under a special commission on a charge of high treason for imagining the death of the queen, levying war in the realm, and adhering to the queen’s enemies. The overt acts of these treasons, charged in the indictment, were the conspiring to deprive the queen of her royal estate, and the devising a plan to seize the Tower of London. The trial was particularly remarkable for the eminent courage and eloquence which the prisoner displayed in his defence.”

We have not room for the details, though very interesting and animated, as our more immediate business is with the result of the proceedings. The evidence produced by the counsel for the crown consisted entirely of examinations and confessions, which either bore not at all upon the charges, or came from attainted and inadmissible witnesses. The prisoner was not permitted to call a witness on his own behalf: his just demands and objections were overruled and refused; and the Lord Chief Justice Bromley delivered a charge to the jury, of which the report only states that “he remembered particularly all the depositions and evidence given against the prisoner; and, either for want of good memory or good will, the



prisoners answers were in part not recited ; whereupon the prisoner craves indifference, and helped the judge's old memory with his own recital." The jury debated the case, apart, for some hours ; and at length the foreman delivered the unanimous verdict of " Not Guilty." " How say the rest of ye, asked the Lord Chief Justice Bromley, is that the verdict of you all ?" They answered, that it was. " Remember yourselves better," replied the Lord Chief Justice ; " have you considered substantially the whole evidence in sort as it was declared and recited ? The matter doth touch the queen's highness and yourselves also. Take good heed what you do." " My lord," said the foreman, " we have thoroughly considered the evidence laid against the prisoner, and his answer to all those matters : and accordingly we have found him not guilty, agreeably to all our consciences."

" Throckmorton now applied for his discharge ; upon which the commissioners consulted together, and the Chief Justice remanded him to the custody of the Lieutenant of the Tower, on the Plea, ' that there were other matters to be charged against him,' although no charge had been suggested by the Attorney-General. The Attorney-General, Griffin, then prayed the court that the jury for their acquittal of the prisoner should be bound in recognizances, to answer any charge which might be brought against them on the queen's behalf. The court granted even more than was desired, *and committed the jury to prison.* After an imprisonment of six months, four of the jury *who submitted*, were dismissed ; the remaining eight, protesting that they had acted to the best of their judgment and consciences, *were grievously fined ; the foreman, and another, to pay, each of them 2000l. ; the others to pay a thousand marks each. They were then re-committed. At length five out of the eight, after lying in prison two months longer, were dismissed on payment of their fines ; the rest not being able to pay the whole, were excused a part and discharged.*"

Here an innocent man escaped the scaffold through the inflexible integrity of twelve of his peers : but such bold and painful discharge of duty is rare among mankind, and shortly after this trial, Sir Nicholas Throckmorton's brother was tried *and convicted upon the same evidence !*

" It was not," says Mr. Phillipps, " until some time after

the Restoration, that this unconstitutional practice of fining juries for their verdicts, was declared to be illegal. Sir Matthew Hale refers to a case, which occurred in the 17th of Car. II. in which all the judges, with the exception of one only, decided that such a fine was against law. But this decision seems not to have been generally acted upon; for, within a very few years afterwards, another instance occurred of fining a jury for their verdict; when the question was again solemnly argued, and the illegality of the practice again declared. The severe and arbitrary treatment of the jury, in this instance, was the more inexcusable, as it was scarcely possible for men of conscience and understanding to entertain any serious doubt of the prisoner's innocence."

Now let the reader ponder upon this. What must have been the state of society, of public morals, and public opinion, when outrages like these could be perpetrated with impunity; when the majesty of justice could be thus insulted in her own temples; and the representatives of the nation seemed to think that the whole business of church and state was to burn heretics and behead usurpers, and leave the people all the while exposed to that worst species of tyranny which is disguised in the forms of law! These, indeed, were the "bloody days of queen Mary:" but the practice of punishing juries for uncourtly verdicts prevailed through all "the golden days of queen Bess," those days to which we are accustomed to refer as the brightest era of our history. It was no better in the times of James the Theologian and the Martyr Charles, nor even under the dynasty of Cromwell and his puritans. Truly the wars and revolutions of the 17th century were not for nothing; and comparing times present with times past, we may be thankful.

The trials of the Duke of Norfolk, and the Earls of Essex and Southampton though much more regular and decorous than that of Sir N. Throckmorton, display the arbitrary rigour of the courts in cases of high treason. Hearsay evidence, written examinations instead of oral testimony, and confessions extorted by torture, were all admitted in proof against the accused, and no witnesses were allowed to be examined on his behalf. The warrant of Elizabeth for the application of the rack to Bannister, the Duke of Norfolk's servant, for

the purpose of obtaining a confession against his master, is preserved in Ellis's Original Letters; and in the case of the Earl of Essex, Sir Edward Coke, the Attorney-General, in open court applauded the queen for her singular clemency in not allowing the witnesses to be racked and tortured for their confessions; a clemency which he represented as "over much cruelty to herself."

The single object in state prosecutions was to convict the prisoner, without reference to his guilt or innocence; and for this purpose, the courts had provided themselves, besides all other iniquity, with rules of interpretation very admirably adapted to explain away as much of the law as they did not care openly to violate. To this verbal craft and chicane they had recourse whenever the letter of a statute was against them, and the doctrine of *constructive treason* held the sword of state suspended, as the will of the sovereign, over the head of every subject in the realm.

The true theory of evidence is even now imperfectly digested in our jurisprudence; but if there is one rule more obviously just than another, it is that when a man is to be tried for his life, he should be openly confronted with his accusers. It was otherwise, however, in the golden days of good queen Bess. The counsel for the crown, in the Duke of Norfolk's case, asserted that the practice of confronting the witnesses with the accused *had proved too hard and dangerous for the prince*, and that the law had consequently been repealed. In speaking of a repeal, they probably alluded to the statute 1 & 2 Phil. and Mary, c. 10. s. 7., which enacts, that all trials for any treason should be according to the due order and course of the common law; and seem to have supposed that this clause had repealed the provision in the 5 & 6 of Ed. 6. c. 11. s. 12., which required that the accusers should be brought *in person before the party accused*, at the time of the arraignment. The judges appear also to have been of the same opinion, as the doctrine advanced by the counsel passed without correction, and the whole of the evidence was composed of letters, written depositions, and confessions. It is certain that the statute of Phil. & Mary, was not intended to repeal the statute of Edward VI.; although that construction of the act was soon found convenient; and the bad practice

of receiving hearsay evidence continued to the reign of Charles I.—The history of the age of Elizabeth is altogether a most curious illustration of the manner in which an undefined and almost unlimited prerogative may be reconciled with the forms of a free constitution.

The life and death of Sir Walter Raleigh are too well known to be minutely recapitulated here. His trial and conviction were in the highest degree unjust, illegal, and barbarous. An imprisonment of fourteen years which followed, he employed in writing the History of the World, and then received his liberty, and the command of an expedition to South America: but when evil fortune overtook him, and he returned without treasure for the king, he was seized at the instance of the Spanish ambassador. and condemned to die on the old judgment of fifteen years' standing, under which he had suffered such a protracted imprisonment. His request for a short respite to settle his worldly affairs was refused, and execution followed the very next day. "Such was the tragical fate of Sir Walter Raleigh, who had contributed so signally to the glory of the English nation; eminently accomplished in the arts both of war and peace, an historian, a poet, statesman, philosopher, and one of the most celebrated captains of the age. He had acquired, at the close of his life, the greatest popularity, and was become a favourite of the people. They sympathised with his adverse fortune, admired the heroic spirit with which he bore his lingering imprisonment, and fondly regarded him as the last of the great captains of Elizabeth's reign. One of his contemporaries, in drawing his character, justly and eloquently styles him, 'that rare renowned knight, whose fame shall contend in longevity with this island itself, yea with that great world which he historiseth so gallantly.'"

We are glad to observe that Mr. Phillipps, in a note, has vindicated the memory of this illustrious man from the aspersions of Hume, who, upon the authority of a document published at the time, and called the King's Declaration, has framed an elaborate justification of the treatment of Raleigh. This declaration, which Hume considers as of *undoubted credit*, being signed by *six privy councillors*, is in fact not signed by one of them. "It is preserved in the Harleian Miscellany,

vol. iii. n. 2. and will be found, on inspection, not to bear any signature at all. It was in truth nothing but an argument artfully and well written, in vindication of the conduct of the king, and published by authority for the purpose of justifying the execution of Raleigh, who was viewed by the nation as a peace-offering to the court of Spain. But not one of the members of the privy council signed it: nor does the declaration itself profess to have their assent or sanction."

In Pine's case, who was tried in the 4th year of Charles I. we meet with some sense and justice in the shape of law; qualities, which in the early state trials, are much more rarely to be met with than many loyal citizens suppose. "Pine was indicted for high treason, in imagining the death of the king. The overt act charged was the speaking certain seditious words, set out in the indictment, which reflected on the king's want of good sense, and his utter unfitness for ruling a kingdom. The words had been used by the prisoner, in conversations with third persons respecting the king. In this case all the judges were assembled, for the purpose of considering whether the speaking of the words amounted to treason. A great variety of cases were cited, in which the speaking of seditious words had been adjudged to be treason. But, upon consideration, it was resolved by the judges, that the offence was not treason within the statute of Edward III."

Here we have an important curtailment of the terrible latitude of that indefinite offence called Treason, for which so much innocent blood has been shed in England. Before this, if a man, in private converse with his neighbour, chanced to observe that King James was not a Solomon, or King Charles an Alfred, his words were an *overt act* of treason, and his next appearance in public was upon the scaffold on Tower Hill. But now the doctrine is, that words are but words, and no treason, unless they be used *as means to an end*, that is, unless they be spoken in direct furtherance of a traitorous design.

A long report of the Earl of Strafford's trial is given, carefully compiled from Howel, Rushworth, Clarendon, Whitelock, and the Parliamentary History. Of course we cannot enter into the details. They furnish such an illustration of the tyrannous practices of the times, that this particular passage of our domestic history has been a perpetual bone of

contention between the monarchical and democratical factions of the state : and bigoted partizans will sometimes estimate a man's loyalty or patriotism by his opinion of the character and fate of Charles's celebrated minister. The usual fate of party questions has attended this. The truth has been studiously disguised in every possible way ; and instead of enquiring into facts, men have prejudged the case according to their political partialities. We think Mr. Phillipps has weighed the matter in a fair and even balance.

When a long course of severe and odious oppressions had driven the nation almost to madness, the Commons in self-defence resolved to call the advisers of the crown to account ; and the Earl of Strafford, as the leader of the band, was selected to be put upon his trial. So far all was fair and constitutional. But on the prosecution of the business, the managers for the Commons committed a fatal error which turned the stream of justice entirely out of its true course. From an over anxiety to visit upon the obnoxious minister the severest penalties of the law, Strafford was impeached not for the crimes of which he was really guilty, but for that under which it was the fashion to include all political delinquency for treason—for levying war against the king, that king in whose service he had shewn himself willing to trample upon all the laws of the land. Of treason, within the terms of the statute of Edward III. he certainly was most innocent. The counsel, therefore, in support of the impeachment, laboured with pernicious zeal to revive the fatal doctrines of “ constructive and accumulative” treason. Against this he defended himself with infinite ability and effect : whereupon the Commons, to make sure of their man, passed a bill of attainder, declaring that to be treason which was not treason before, and Strafford was cut off by a retrospective law. Here was the real grievance of his case ; and of this his partizans ever since have taken advantage to represent him as an innocent victim of popular fury. But his innocence is one thing, and the legality of his sentence is another. He was indeed guiltless of treason : he had never levied war against the king ; but he had levied most despotic war against the lives and liberties of all the king's subjects, a far heavier crime than the other, but one for which the laws had provided no adequate punishment. Strafford was a tyrant by nature, the ablest and

the worst of Charles's evil councillors, and his death after all was more a sacrifice than a murder.

His defence of himself before his judges contains passages of the most affecting eloquence ; and his whole deportment throughout his trial, and on the scaffold, was in the highest degree noble and imposing. These circumstances, and his tragical end, have wrought upon the sympathies of the writers and readers of history ; have drawn away their attention from the actions of his life, and thrown over the memory of this great delinquent the fame and dignity of a martyr. Such is the power of pathetic situations over the feelings and even the reason of mankind.<sup>1</sup>

The first of the regicides that suffered after the Restoration was Harrison, one of the wildest and most honest of the puritanical enthusiasts. He was arraigned with many others, whose names had been excepted in the act of indemnity ; " and Sir Orlando Bridgman, the lord chief baron, addressed the jury in a speech of great length ; in the course of which he insisted much on the divine right of kings to rule their subjects free from all responsibility ; reprobated in the strongest terms the violent proceedings of the long parliament ; and concluded with the following exhortation, well suited to the temper of the times, but unfit for a court of justice : ' You are now to inquire of blood, of royal blood, of sacred blood, blood like that of the saints under the altar, crying *Quousque Domine*. This blood cries for vengeance, and will not be appeased without a bloody sacrifice. He that conceals or favours the guilt of blood, wilfully and knowingly takes it upon himself ; and we know that from the time that the Jews said, ' Let his blood be on us and on our seed,' it has continued on them and their posterity to this day.' "

Harrison underwent the barbarous sentence of treason to the very letter, and bore all, as Burnet relates, " with a calmness, or rather cheerfulness, that astonished the spectators."

Upon this trial we have the following resolution of the judges : " If any one overt act, tending to the compassing of

<sup>1</sup> Perhaps these remarks on Strafford are too harsh. The unrelenting fury with which his life was sought and the forms of justice trampled down to reach him, are proof enough that arbitrary notions were the vice of the times, rather than of individuals, and that the one party was as ready as the other to abuse the power which it possessed.—Edit.

the king's death, he laid in the indictment, *any other* overt act, which tends to the compassing of the king's death, may be given in evidence together with that which is laid."

And in the case of Sir Henry Vane, they laid down the five following rules:

1. "By the death of King Charles I. the long parliament was actually dissolved, notwithstanding the acts of parliament enacting that it should not be dissolved except by consent of both houses."

2. "It was resolved, that though King Charles II. was *de facto* kept out of the exercise of the kingly office, by traitors and rebels, yet he was king both *de facto* and *de jure*; and all the acts which were done to the keeping him out were high treason."

3. "It was resolved, that the very consultations, and advising together, on the means to destroy the king and his government, was an overt act to prove the compassing of the king's death."

4. "It was resolved, that the statute of Westminster, 13 Ed. 1. c. 31. which gives the bill of exceptions, extends only to civil causes, and not to criminal."

5. "It was resolved, that, in this case, the treason laid in the indictment being the compassing of the king's death, (which was in the county of Middlesex) and the levying of war being laid only as one of the overt acts to prove the compassing of the king's death; though this levying of war be laid in the indictment to be in Middlesex, yet a war levied by him in Surrey, might be given in evidence; for being not laid as the treason, but only as the overt act to prove the compassing, it is a transitory thing which may be proved in another county. But if an indictment be for levying war, and that be made the treason for which the party is indicted, in that case it is local, and must be laid in the county where in truth it was."

Now then, "Chaos is come again!" What is treason? Mr. Phillipps indeed does his best to extract consistency out of contradiction, and to make a meaning for those who had none themselves; but his interpretations, however skilful, have failed to harmonize the discord of our law books.

In 20 Charles II. Messenger, Beasley and others were tried at the Old Bailey for high treason, in tumultuously assembling themselves together in Moorfields, and pulling down



brothels; a practice common at that time among the idle apprentices of London. The jury having found the facts, all the judges with the single exception of Sir Matthew Hale, declared the offence to be treason within the clause of levying war against the king; *because it was to be presumed that the rioters meant and intended to pull down brothels in general*, i. e. all brothels in the kingdom, and not some local brothels in particular. And accordingly these few idle mechanics were convicted of high treason, and sentenced to be "drawn to the gallows on a hurdle, to be hanged by the neck, and then cut down alive, to have their bowels taken out, and burned, while they were yet alive, their heads cut off, their bodies divided into four parts, and their heads and quarters delivered to the king's disposal." Such was the sentence in cases of high treason, which Blackstone tenderly calls "very solemn and terrible," and Sir Edward Coke justifies out of Scripture: "For Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest."

But return we to the point of law in this case, for it is a most happy illustration of the mystic art of construing acts of parliament. Treason, says the statute of Edward III. "is levying war against the king." Now nothing, say the learned judges upon this trial, can possibly be clearer than that to pull down all the brothels in the kingdom is levying war against the king; and as it is equally clear that to pull down *some* brothels in Moorfields is the very same thing in point of law as to pull down *all* brothels in the kingdom, there can be no doubt but these prisoners are guilty of treason within the statute. Such is the logic of the courts; yet Blackstone assures us that penal acts are always to be construed strictly and to the letter. But Mr. Phillipps defends the doctrine of constructive treason; he says the judges must interpret the language of the legislature, and that *constructive* or *interpretative* treason is no worse than constructive or interpretative felony or larceny. Perhaps not: yet with due deference to high authority, we must contend that there ought to be no such thing as constructive crime of any sort; and that no man should be liable to be hanged, drawn and quartered for an offence which the judges themselves are not agreed whether it be high treason or a simple misdemeanor. We make no doubt but Mr. Phillipps himself knows,

or thinks he knows, very precisely what treason is ; but we are sure that the judges before the revolution did not know, and it was impossible that any plain unprofessional man could know. If there were cases one way, there were cases another way ; and if some cases were held to be of better authority than others, how was he to know them ? or, knowing them, how was he to extract from that heterogeneous mass the simple sense of that terrible law which not only took the lives of its victims by torture, but visited their sins upon their children to the third and fourth generations ?

Blackstone, the most patient of men in the weary task of disentangling legal webs, has been able to make nothing of treason ; for it is not like the laws of the Medes and Persians ; it is one thing to-day, and another to-morrow. It is sometimes the shield, and sometimes the sword, of kings.

We pass over the cases of Staley and Lord Stafford, both innocent victims of the Popish plot ; for we have no mind to enter here upon an examination of that bugbear of fraud or folly to which so many lives were sacrificed. It rested, as is well known, chiefly upon the evidence of Titus Oates, a wretch, whose testimony in spite of sense and justice, " was believed," says Voltaire, " that there might remain no species of atrocious folly that hath not entered into the heart of man."—(*Commentary on Beccaria.*)

To the Popish plot succeeded the Ryehouse or Protestant plot, which was not, indeed, such an " unreal mockery" as its predecessor ; yet among its victims there were those whose blood shall be required at the hands of that generation. The most celebrated and distinguished objects of the vengeance of the court were Russell and Sydney ; whose cases, however, were considerably dissimilar in their legal merits. Russell was convicted upon evidence which might fairly divide the judgments of conscientious men. It was, indeed, the testimony of accomplices ; that is to say, of men who swore against their friends to save themselves ; but still it was circumstantial and imposing ; and just of that equivocal character which leaves a scrupulous mind in the most painful suspense and uncertainty. The private virtues of Lord Russell are attested by all parties : and the solemn written declaration of his innocence which he left in the hands of the

sheriff on the scaffold, weighs more strongly in his favour than any exception which can fairly be taken to the verdict of the jury. Mr. Phillipps's commentary upon this interesting trial is exceedingly judicious. We pass entirely over the argument as to whether the offence was treason or only misprision of treason, because we think we have said quite enough upon the subject of treason to make it evident that, whatever that offence may be now, before the revolution it was any thing or every thing which the court and judges pleased. But leaving the point of law to those who think they can decide it, we must declare ourselves constrained, upon a review of the evidence, to conclude with Mr. P., "that the trial of Lord Russell, defective as it undoubtedly was, and inconsistent with the practice and principles now happily established, was yet one of the least exceptionable of the State Trials of that period."—

Not so, however, was the trial of Algernon Sydney, who was condemned upon evidence which, both, in a moral and a legal sense, may justly be called no evidence at all. It is almost enough to say that the presiding judge upon the occasion was Jeffries, who behaved with more than his accustomed savageness towards the prisoner, and, in his charge to the jury mis-stated both the law and the facts to the utmost of his power. "Sydney defended himself with the spirit and courage which marked his character; and though frequently interrupted by the chief justice, and diverted from the course of his observations, preserved throughout the trial his temper and self-possession undisturbed." The judgment for high treason being pronounced: "Then, O God! O God!" he exclaimed, "I beseech thee to sanctify these sufferings to me, and impute not my blood to the country, nor to the city through which I am to be drawn. Let no inquisition be made for it; but if any, and the shedding of innocent blood must be avenged, let the weight of it fall only upon those, who maliciously persecute me for righteousness' sake."

"I pray," said the chief justice, "I pray God to work in you a temper fit to go into the other world; for I see you are not fit for this."

"My Lord," (replied Sydney, stretching forth his arm)

"feel my pulse, and see if I am disordered. I bless God, I never was in a better temper than I am now."

Thus closed this memorable trial, which is noticed by Evelyn in his journal in the following manner. Speaking of a wedding in the city at which he was present, he says, "There was at the wedding the Lord Mayor, the Sheriff, several aldermen, and persons of quality; above all, Sir George Jeffries, newly made Lord Chief Justice of England, with Mr. Justice Withers, who danced with the bride, and were exceeding merry. These great men spent the rest of the afternoon, till eleven at night, in drinking healths, taking tobacco, and talking much beneath the gravity of judges, that had but a day or two ago condemned Mr. Algernon Sydney, who was executed on the 7th on Tower-hill, on the single testimony of that monster of a man — Lord Howard of Escrick, and some sheets of paper taken in Mr. Sydney's study, pretended to be written by him, but not fully proved, nor the time when, but appearing to have been written before his majesty's restoration, and then pardoned by the act of oblivion; so that though Mr. Sydney was known to be a person obstinately averse to government by a monarch, (the subject of the paper was in answer to one of Sir R. Filmer) yet it was thought he had very hard measure. There is this yet observable, that he had been an enemy to the late king, and in actual rebellion against him; a man of great courage, great sense, great parts, which he showed both at his trial and death; for when he came on the scaffold, instead of a speech, he told them only that he had made his peace with God, that he came not thither to talk, but to die; put a paper into the sheriff's hand, and another into a friend's; said one prayer as short as a grace, laid down his neck, and bid the executioner do his office."

Jeffries had now entered upon that career of judicial butchery which stained with continual bloodshed the reigns of Chas. II. and his successor. The Ryehouse plot was not yet atoned for; and Hambden and Armstrong appear next upon the scene. The former, (grandson to the great patriot of that name) was arraigned for a misdemeanor only, since treason required two witnesses, and only one could be procured against him, in the person of that same monster of a man,

Lord Howard of Escrick, who had already borne false witness against Russell and Sydney. Hambden was sentenced to pay a fine of no less than 40,000*l.* for which he suffered a severe imprisonment; and was then (another witness having been obtained) tried for treason, upon the same evidence of the same overt acts, and convicted; but afterwards pardoned on account of the palpable injustice of the second trial for the same offence.

Sir Thomas Armstrong, upon the discovery of the plot, had escaped into Holland, and had in consequence been prosecuted to outlawry. Having been apprehended afterwards at Leyden, under a warrant obtained from the States, he was arraigned in the king's bench upon the outlawry, and without a trial was sentenced to death, in direct violation of the statute of 5 & 6 Ed. 3. c. 11. which gives to an outlaw the right of traversing his outlawry within a year, and of having the benefit of a trial. He suffered the sentence in its utmost rigour.

When the battle of Sedgmoor had put an end to Monmouth's rebellion, Jeffries set out for the West "with a savage joy," says Hume, "as to a full harvest of death and destruction." Among his hundred of victims, there were none more innocent or more deplored than Lady Alicia Lisle, and Elizabeth Gaunt. The former was tried for "harbouring in her house one John Hicks, knowing him at the time to be a traitor," and was, without the semblance of legal proof, convicted and condemned to be burnt alive. She interceded for a commutation of this punishment, and submitted to the axe of the executioner with great dignity and fortitude in the 76th year of her age.

The other case is thus briefly told by Hume—"Mrs. Gaunt was an Anabaptist, noted for her beneficence, which extended to all professions and persuasions. One of the rebels, knowing her humane disposition, had recourse to her in his distress, and was concealed by her. Hearing of the proclamation, which offered an indemnity and rewards to such as discovered criminals, he betrayed his benefactress; and bore evidence against her. He received a pardon as a recompence for his treachery; she was burned alive for her charity."

The mode in which this last trial was conducted suggests the important question whether, in criminal investigations the prisoners themselves should be cross-examined by the court, or entirely excused and even discouraged from saying anything to criminate themselves. The former method prevailed in the courts previous to the revolution, but has since fallen into disuse as inconsistent with the notion of a fair trial. The change is generally regarded as a great improvement, though Mr. Bentham treats it as altogether the effect of prejudice and misguided feeling of humanity.<sup>1</sup>

"It is clear," says Mr. Phillipps, "that the old practice would scarcely ever fail to detect guilt, if the accused is guilty. But it would also confound the innocent with the guilty. Questions from a judge, even from the most impartial and humane, would often surprise, embarrass, and confound the accused. Sometimes even an innocent person might equivocate, or be guilty of misrepresentation, from mere alarm; and sometimes he might refuse to answer. This embarrassment, equivocation, or silence, would inevitably be imputed to the consciousness of guilt. Independently of this prejudice to the accused, the appearance of personal altercation, which a cross-examination is too apt to excite, would lower the dignity of a judge, and in the same degree lessen the respect due to courts of justice."

The last objection, it seems obvious, might be removed by assigning the duty of cross-examination to the counsel for the prosecution instead of to the judge; but the other danger, above suggested, of surprising and confounding the innocent, will probably be thought decisive of the question. A middle course, however, is recommended with great appearance of reason by M. Dumont, in his observations upon Mr. Bentham's doctrine. "On devrait," says he, "se borner à interroger le prévenu lorsqu'il y a des lacunes dans le témoignage, lorsque ses réponses vraies ou fausses conduiront à les remplir. Si tout est prouvé sans lui, s'il n'a rien à dire pour sa défense, qu'a-t-on besoin de l'interroger? Je ne voudrais pas l'exclusion de ce moyen, mais son économie."

"Depuis que j'ai suivi notre tribunal à Genève, j'ai vu des

<sup>1</sup> Traite des Preuves Justiciaries, tom. ii. liv. vii.

cas où, sans la faculté d'interroger le prévenu, on n'aurait pas pu le convaincre. Ce n'est point son aveu qu'on demandait, mais on lui adressait des questions qui confirmaient les témoignages ou conduisaient à de nouvelles preuves."

But however this question may be decided ; whether our practice, or the continental practice, or M. Dumont's middle practice, be preferred, all unprejudiced men must agree in condemning the extreme to which our courts push their principle. For a judge earnestly and even authoritatively to discourage a penitent offender from making the last reparation in his power to God and his country by confessing his crime ; to exhort him expressly to take his chance of escaping justice by a legal flaw, is surely a practice no less absurd in itself than it is unworthy of the judgment seat. It is to confound in vulgar minds the distinctions of truth and falsehood : to do evil that no good may come. Yet once it was the fashion to applaud in this practice the humanity of the English law, as if blind chance were the measure of humanity, or of any thing else which ought to be held in respect in courts of justice.

The trial of Lord Delamere for high treason, in having been a party to Monmouth's rebellion, is chiefly remarkable for the strenuous effort which Jeffries made to get rid of the important law which requires the evidence of two witnesses to sustain a charge of treason. There was only one witness who bore any material evidence against Lord Delamere ; and when the prisoner pressed this objection with great force in his defence, Jeffries, the Lord High Steward upon the occasion, told the jury, as he had often done before, particularly upon the trial of Algernon Sydney, that a single witness proving an overt act of treason, and another witness proving some act of the prisoner, not in itself of a treasonable nature, but confirmed by the evidence of a former witness, would together be sufficient to convict. The instance put by him, to illustrate his opinion, was this : " If A B buy a knife of C D for the purpose of killing the king, and it is proved by one witness that he bought a knife of C D for this purpose, and another witness prove only that he bought the knife of C D, they are together sufficient." Now here we have the statute of Edward VI. which provides the two

witnesses, reduced at once to a dead letter ; and this is a fair example, though perhaps a strong one, of the manner in which the courts have often dealt with the most solemn acts of the legislature.

There is not in the science of government a more important or more difficult question than how to provide for the faithful interpretation of written laws. Either the statute must be so framed as to apply with precision to an unforeseen variety of cases, or it must be expressed in general terms ; and the application entrusted to the discretion of the judge. Both modes have been tried, and with very indifferent success. No lawgiver, speaking to future generations, has ever been able to place his meaning beyond dispute, to triumph at once over the ignorance and the perverseness of mankind. On the other hand, a latitude of interpretation confided to the courts opens a door to frequent injustice, and to infinite confusion—evils so sensibly felt, that they have themselves endeavoured to provide against them by establishing the authority of precedents ; but here the remedy is worse than the disease, for the precedents in their turn become matters of dispute ; and the term reports are, perhaps, as full of perplexity as the statutes at large.

We are not ignorant of the theory of those philosophers who maintain, that under a perfect system of political science, the letter of the law might be so devised as to fit every possible case ; but one thing we are afraid is clear—that so long as the art of law-making shall continue to be what it is and ever has been, the most imperfect of all the arts, we should gain but little by restricting the discretion of the judges. Let it, however, be remembered, that such discretion amounts *pro tanto* to independent legislative power, and confounds in practice the two functions so jealously distinguished in theory—the *jus dare* and the *jus dicere*.

The last case in this collection is the celebrated case of the Seven Bishops. It is interesting on account of its public and political importance, and familiar to every one who is acquainted with English history. The report of the trial consists, in great part, of long arguments on points of law ; such as, whether the bishops, as peers of parliament, could be legally committed on a charge of libel ; whether they



were compelled to plead *instante* to the information, or might have an imparlance; whether there was legal proof of the handwriting of the signatures, and of the publication of the alleged libel in Middlesex: all which points we may pass over as purely technical, and unconnected with the substantial merits of the case. The facts were few and simple. The king in 1687 published a declaration proclaiming liberty of conscience to all his subjects, and a dispensation from all the penal statutes passed for enforcing conformity to the established religion; from the oaths of supremacy and allegiance, and the several tests which had been imposed by two acts of parliament in the preceding reign; and absolving all non-conformists and recusants from every kind of forfeiture which they had incurred by their non-conformity. No sooner was this declaration made public, than it gave great offence to the whole nation. The true principles of toleration were unknown in those polemical and persecuting times, and every one felt that liberty of conscience in the mouth of such a gloomy bigot as King James, could mean nothing but an insidious design to reinstate popery on the ruins of the protestant church of England. Moreover the dispensing power claimed by the declaration, was an undisguised attempt to exalt the crown above both parliament and the laws. All this was manifest to every man who thought about the matter; but the king was bent upon his object; and he required of the clergy that they should read the declaration publicly in all the churches of the kingdom. Upon this the archbishop of Canterbury and seven of the other bishops met in the palace at Lambeth, and drew up a remonstrance in the form of a petition to the king, expressed in respectful language, but protesting strongly against the tendency of the declaration, especially the dangerous and illegal assumption of a dispensing power; and declining firmly to comply with the order of the privy council in distributing the declaration to the clergy, or sanctioning the reading of it in the churches. They then each of them signed the petition, and delivered it with their own hands to the king, in a personal audience at Whitehall. The arbitrary monarch was surprised and offended. He charged them with raising a standard of rebellion in the land; and

when, after much angry expostulation, the bishops stood firm to their purpose, he abruptly dismissed them from his presence. But after an interval of a few days, they all received a summons to attend the king in council, where the Lord Chancellor Jeffries extorted from them an admission of their signatures to the petition; and upon their refusing to enter into a recognizance, they were committed under a warrant of the privy council, state prisoners to the Tower; and the attorney general received orders to proceed against them by information for a seditious libel. From that moment the cause of the bishops became the cause of the whole protestant population of England, and the anxiety and alarm evinced by all classes of the people during their imprisonment and trial, was equalled only by the universal acclamations which hailed the verdict of acquittal. These prelates certainly made a bold and judicious stand at a most critical moment, and their names are immortalized in the annals of England. William Sancroft, archbishop of Canterbury; William Loyd, bishop of St. Asaph; Francis Turner, of Ely; John Lake, of Chichester; Thomas Kenn, of Bath and Wells; Thomas White, of Peterborough; and Jonathan Trelawney, of Bristol.

We close these interesting volumes with reluctance. However unimportant they may appear in the eyes of profound lawyers and microscopic antiquarians, we regard them as a valuable contribution to the popular instruction of our countrymen. They bring the lessons of history home to the bosoms of men, and throw light upon the mysteries of jurisprudence. The designs of despotism, and the time-serving character of both bench and bar (we allude, of course, to former times), have had the most baneful effect upon those branches of law to which this article more particularly relates. Tares have been sown among the wheat; and "an enemy hath done this." But if to know the disease be half the cure, every publication that tends to diffuse and popularise the study of criminal law is of great value—and such in an eminent degree is the character of this selection from the *State Trials*.

Mr. Phillipps has executed his task, in our opinion, with judgment and ability: his historical illustrations are judi-

ciously selected, and his estimate of the merits of each trial are candid and discriminating in an uncommon degree. Sometimes, indeed, the lawyer a little gets the better of the philosopher in the serious gravity with which he enters upon the discussion of questions rather subtle than substantial, and in a certain reverential tenderness which he shews in exposing the learned sophistries and solemn trifling of judges and commentators. But allowing for all defects of this kind, real or imaginary, a manly spirit of good sense runs through the work, and clearly distinguishes the author as a man of a sound and cultivated understanding.

Under the title of an Appendix to the last volume, there is a learned disquisition upon the court of the Lord High Steward (the joint production of Mr. Phillipps and Mr. Amos); but after the space we have already occupied, we cannot enter into any examination of it in our present number. Perhaps on some future occasion the subject may afford matter for a separate notice, more strictly connected with professional topics than the light and irregular details for which we have now to request the indulgence of our learned readers.

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### ART. III.—MERCANTILE LAW.

#### No. II.

IN pursuance of the plan marked out in our introductory article, we proceed to give a rapid sketch of the rise and progress of trade, together with a brief notice of its existing state in this country; avoiding, unless necessary for the clear developement of a legal principle, all such topics as belong more properly to the province of political economy.

Division of labour, which is the first step towards civilization, is necessarily attended with an interchange of commodities. This, at first, is a direct barter in kind of the superfluity of one individual, for the superfluity, in some

different article, of another. The inconvenience of this method, and the restrictions which it imposes on traffic, soon, however, suggest the introduction of a conventional medium of exchange, for which purpose choice has generally been made of some one or more of the scarcer metals, both for their durability and their little variation in value. Money, which is the name it has received with us, is valuable, not so much for its intrinsic worth (for silver and gold, however precious, are commodities which we seldom want), but as the means of procuring other commodities which we do want. It is a token indicating that the possessor has bestowed on others goods of his own of a certain value, and empowering him to receive, by the transfer of the token, an equivalent in such other goods, as may better suit his wishes or necessities. It serves, at the same time, as the *measure* of this value; for the metal, of which it consists, being divided into small portions of a size, weight, and quality fixed by authority, and of a value which may for all practical purposes be considered as constant, it furnishes a common third, in aliquot parts of which the value of all other commodities may be reckoned.

From the introduction of money may be dated the origin of trade, the limited transactions of barter being scarcely entitled to the name. It should, however be borne in mind, that, though greatly extended as well as facilitated in its operation by the interposition of this machinery, the exchange of commodities remains in substance the same. The difference is this — that A, instead of receiving immediately the commodity of B in return for his own, receives that which will procure him, either now or at any future time, whatever commodity he may want, of equal value with his own. The principle is still reciprocity of actual benefit. The name only, not the character of the transaction, is changed: what was before a *barter*, is now called a *sale*; and A is said to *sell*, and B to *buy* the goods.

All objections on the part of the proprietor to dispose of his surplus stock being thus removed, there would naturally be a resort of sellers wherever there was a probability of a demand: and mutual convenience would quickly lead to the

adoption of a stated time and place of meeting for the purposes of traffic. Hence the establishment, in some central and populous part of each district, of *markets*, for the sale of commodities in ordinary request ; and of *fairs*, at greater intervals, for dealings of a more extensive kind. The transactions at these public marts, as they are among the earliest, so are they in general the simplest operations of traffic, being, for the most part, bargains for the sale of goods, carried into immediate effect by delivery on the one part, and payment on the other. We say for the most part, because some commodities being too bulky to be conveniently transported to market and carried home again if unsold, would be disposed of by samples. In these cases an interval takes place between the bargain, which properly constitutes the sale, and the delivery and payment which complete it ; and out of the various circumstances which may take place during this interval, questions somewhat more complicated not unfrequently arise between the parties.

We have hitherto supposed trade to be confined to the mutual dealings of the inhabitants of particular districts. But the wants of men extend with their means. A demand arises for rarer and more remote commodities, and has no sooner arisen than it is supplied. For on the other hand, competition and accumulations of stock render it necessary to seek more distant markets ; and thus, by a gradual and simultaneous approximation of buyers and sellers, the traffic of each region is pushed beyond the limits of its immediate neighbourhood, and the sphere of communication is widened. Certain tracts of country are better suited to the growth of particular produce, whilst others, either from their vicinity to the places from which the rude material is obtained, or from other local advantages, become celebrated for a particular species of manufacture. Thus, to select an obvious instance, hilly regions are more favourable to the growth of wool ; plains, to the production of corn. In the neighbourhood therefore of the former, cheaper and better cloth would be found ; in that of the latter, cheaper and better grain. As soon then as the periodical fairs become inadequate to supply the continually increasing demand, itinerant traders appear, who, under the name of pedlars, vend the wares of

one district among the inhabitants of another ; making, by an addition to the price, such a profit as may remunerate them for their labour and risk. The occasional stalls of the fair, and the packs of the pedlar, are followed, and soon, in a great measure, superseded, by the establishment of permanent shops ; the proprietors of which are a sort of middle-men between the producer and consumer, purchasing in wholesale from the former the various articles which may chance to be in request, and retailing them at an advanced price among the inhabitants of their own immediate neighbourhood. As wealth and population advance, and, by consequence, demand increases, it becomes necessary to add to the stock in each particular article, until at length it is found expedient to confine the trade to some specific class of goods ; and thus, by degrees, a body of *shopkeepers* is created, dealing each in a particular kind of commodities. Again, as the profit of the producer depends mainly on a speedy return of the cost of production, of course those who could purchase the largest quantities would be able to procure them also at the cheapest rate. Hence the formation of another class of intermediate tradesmen, called, distinctively, *wholesale dealers*, or *warehousemen*, who, being possessed of a larger and more disposable capital, buy up the stocks of the grower or manufacturer, and dispose of them in smaller stocks to the retail tradesmen or shopkeepers. And thus, even without taking into account the subdivision of mechanical employment, which keeps at least equal pace with the increase of intermediate dealers, the steps between the grower and consumer are continually multiplied.

Now the transactions between the proprietor of the raw material and the manufacturer, between the manufacturer and the warehouseman, and between this latter and the shopkeeper, suppose, as we have seen, the transfer of large stocks, between parties for the most part resident at considerable distances. The transmission, therefore, of the purchased property becomes an object of considerable importance, and one which in early times would necessarily be attended with difficulty, hazard, and expence. In an industrious community, however, a want is not long felt before it is supplied. It was natural, therefore, and in the course of things, that individuals

should present themselves, willing for a reasonable compensation to undertake the safe conveyance from place to place of whatever goods might be committed to their charge. Originally this conveyance would be by waggons overland, and along navigable rivers by barges ; but as trade and capital increase, not only are lighter vehicles invented for the more expeditious transmissions of lighter goods by land, but artificial rivers or canals are formed, connecting the districts from which the raw material is obtained with the seats of manufacture, and these again with the distant markets. At present, therefore, the inland communication is kept up by waggons, stage-coaches and vans ; by canal-boats and river-barges ; the proprietors of which are classed indiscriminately under the name of *common carriers*. The owners of the soil along the banks of these rivers and canals would not unreasonably require some compensation for the permission to take on board and discharge the cargoes of the vessels which navigated them ; besides which, there would be both inconvenience and risk in leaving them exposed until it might be convenient to remove them. Hence, at different points along the line of communication, wharfs were constructed, at which goods might be deposited for loading or delivery, the proprietor or *wharfinger* undertaking for a proportionate remuneration, to keep them safe and undamaged until they were carried away to their destination.

But besides this overland communication, it is evident that in an insular country like this, the surrounding seas would early be made subservient to the purposes of traffic. The coasting trade of England seems indeed to have been almost coeval with first efforts of her industry ; and constitutes at this day one of the most important appendages to her domestic commerce. It is to the exigencies of this mode of conveyance that we owe the construction of ports, quays, piers, and docks ; and when these are wanting, or not easily accessible, another class of men steps in, who, under the name of *lightermen*, undertake the unloading of vessels, and the transport of their cargoes to the wharf. But with such advantages as England possesses, the spirit of enterprise would not long be confined to her own shores. The same causes which have been alluded to as producing the gradual

expansion of traffic into remoter districts of the same country ; together with the facilities afforded by the progressive improvements in navigation, would operate in a precisely similar manner to extend those dealings to the inhabitants of other countries. Thus, for example, the flax of Ireland, and, consequently, its linens, were found to be better than those of England ; whilst the woollen cloths of England claimed a like superiority over those of Ireland. The latter were desirable for their warmth ; the former for their cleanliness and elegance ; and hence an interchange naturally took place of the surplus woollen cloths of the one for the surplus linen fabrics of the other. The same observation, carried onward, applies to the wines of France and Portugal, the silks of Italy, the hides and timber of the Baltic. Stimulated by wealth, adventure, and the thirst of gain, commerce rapidly extends itself. Lands more and more remote are sought, either as a vent for the superfluities of a busy and overstocked community, or for the gratifications which they are able to minister to its real or artificial wants. Colonies are formed ; plantations established ; and the whole civilized world becomes at length a general mart, each country contributing to the common stock either the choicer productions of its soil, or the works of its superior skill. The juice of a leaf gathered in the remotest nation of the East, and sweetened by the pith of a reed grown in the islands of the western ocean, now forms the ordinary beverage of every class in England. On the other hand, the cotton cloths manufactured here are worn by the inhabitants of the tropics ; the woollens by men who border on the arctic regions. The material out of which the former is fabricated is fetched from Brazil, from the East Indies, and from the islands of the Spanish main. It is dyed by the juice of an herb<sup>1</sup> which flourishes in Bengal, and the blood of an insect<sup>2</sup> which is reared in Mexico. Experience, indeed, has shewn that the transmission of commodities by sea is both easier, cheaper, and more expeditious than that by land ; and thus the ocean, which seemed the barrier to social intercourse, serves rather to connect and unite the families of the earth. The interest

<sup>1</sup> Indigo.<sup>2</sup> Cochineal.



and magnitude of the topic will be an excuse for this brief digression. But our limits forbid us to extend it; and we return. The *owners* of ships, by the medium of which this wide and beneficial intercourse is carried on, constitute the last, the most numerous, and the most important class of public carriers. Immediately connected with these is another and highly influential body of men, who are designated *par excellence* by the name of *merchants*. Originally, of course, the ship-owner and the merchant were one; but the separation must have taken place at a very early period. The adventurer who had brought home a cargo of foreign products would soon learn to release himself from the risk, the trouble and delay of dealing them out in small portions, by disposing of the whole at a much inferior rate to some one who was willing for the profit to submit to the inconvenience. This latter, if the speculation answered, would then employ the owner of the vessel to procure and bring over for him another cargo of the same or like commodities. His next step would be establish on his own account a connexion in the foreign market, to purchase the goods and supply the funds himself, and, in short, to take upon him the whole risk of the adventure, hiring merely, for a stipulated reward, the services of the ship-owner in transporting the cargo. The same observations will apply *mutatis mutandis* to the export trade. There, also, the merchant would by degrees step in between the grower or manufacturer and the ship-owner, would take the risk and profit of the sale in the foreign market, and employ the proprietor of the vessel simply as his carrier. At this day, therefore, ship-owners, whether engaged in the coasting or the foreign trade, are, in effect, public carriers by water. The same general principles, therefore, which apply to carriers by land, equally govern them. There are, however, many and very important regulations arising out of the relation of the ship-owner and the merchant, which form a peculiar code affecting them alone. The engagements which they enter into are, for the most part, the subject of special contracts, attested by formal instruments called *charter-parties*. Sometimes the whole vessel is taken into the service of the merchant for a definite period, or a particular voyage. In this case, he either takes entirely

upon himself the temporary controul and ownership, or leaving the possession to the proprietor, has merely the use and benefit of it for the stowage of his goods. In the former case he is called the charterer or hirer ; in the latter, the freighter of the ship. Sometimes, again, he stipulates merely for the use of a part of the vessel, agreeing to pay for the freight or carriage of his goods after the rate of their tonnage. In this case no charter-party is executed ; but when the goods are put on board, an instrument, termed a *bill of lading*, is tendered by the shipper to the commander for his signature. By this document the latter acknowledges the receipt of the goods on board, and engages to carry them safely and deliver them in good order to the person to whom they are consigned. A counterpart of the bill of lading is immediately transmitted to the consignee, another is delivered to the master of the vessel, and the original remains with the shipper, each of the other parts being void on fulfilment of the terms of one. The property in the goods specified may be transferred by the indorsement and delivery of this instrument, and the first *bonâ fide* indorsee has the priority of claim. Without entering farther into details, which would be manifestly inconsistent with our present design, we may content ourselves with observing, what indeed is sufficiently obvious, that in transactions so extensive many difficult and important questions are involved. Nor is this all. The proprietor of the vessel, for the most part, delegates the command, and the conduct of the voyage, to some professional seaman ; and hence new relations spring up — between the owner and commander, and between the commander and the subordinate officers and crew — also governed by peculiar rules and usages, or forming the subject of express agreements. When to this we add the regulations as to the registry and transfer of ships, pilots, ports, docks, customs and other dues, the usages of foreign countries to which ours must in some degree be accommodated, and the rules which relate to partial losses and expences of necessary repair, with the assessment of the proportionate contributions under the name of *average* ; and, lastly, the raising of money for these and other purposes by the hypothecation of the vessel, called *bottomry*, or of the

goods, called *respondentia*, a subject opens upon us apparently as intricate as extensive.

It has been intimated that the ship-owner contracts to convey the goods in safety. His engagement, however, is qualified with a wide exception as to the perils of the sea, and the acts of the king's enemies. For any loss which may arise from wreck, tempest or capture, he is not responsible. It is evident, therefore, that the freighter as well as the owner of the vessel is subject to considerable risk in every voyage. The cargo of the former, and the vessel, stores, and tackle of the latter, may be lost or damaged by violence or accident; but besides this the ship-owner is exposed to loss arising out of the fraud, wilful negligence or other misconduct of his captain and crew, for the consequences of whose acts he is also answerable to the freighter. Out of these risks and the injurious consequences which resulted from them to individuals, a practice has arisen of great and acknowledged utility. A number of persons stipulate, in consideration of a premium varying with the risk, to insure at their joint hazard both the ship-owner and the merchant against all or any of these contingencies. An instrument is drawn up attesting the contract, and called a *policy of insurance*, at the foot of which those who are willing to take part in the speculation subscribe their names, and are thence called *underwriters*. At what period this most valuable usage sprung up does not exactly appear. It has, however, an undoubted claim to great antiquity; for we find honourable mention made of it in the preamble to the stat. 43 Eliz. c. 12. "By means of policies of insurance," says the legislature of that day, "it cometh to pass upon the loss or perishing of any ship there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not, than those that do adventure; whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely." But in order to entitle himself to these advantages, the party insured must act towards the insurer with perfectly good faith. He must make no false representations — conceal no defects. The vessel must be in every respect fit for sailing, or, as it is technically termed, sea-worthy. She must enter upon the

voyage specified in the policy, and no other. There must be no intentional deviation from the line of that voyage. In short, no risk must be incurred which might not fairly be contemplated by those who bind themselves to the indemnification. When these conditions are fulfilled, nothing can release the insurers from the liability which they have voluntarily incurred; and it is matter of honest pride to this country, that the scrupulous punctuality with which these engagements have generally been fulfilled, has been an inducement to foreign traders to effect their policies by preference in England.

The fiscal regulations of this country as to the duties imposed on goods imported for home consumption, and remitted as to goods which are again exported, have led to a practice now prevailing to a great extent, and which it is necessary in the prosecution of our plan to advert to—we mean the system of *warehousing*. But, without entering into particulars, it is enough for the present to state, that payment of the duty on specified articles is not exacted at the time of importation—that upon a bond given by the importer in double the value of the duty for payment, if required, at the expiration of a definite period, he receives from the officer of the customs or excise a *warrant* permitting him to land the goods (which are specifically enumerated in the instrument) and to deposit them in the warehouses attached to the dock. They are then said to be in bond. The importer, though he has not actual possession of the goods, has access to them for the purpose of inspection or sale, and the warrant serves as the symbol of his property. By the indorsement and delivery of this document he may effect as valid and complete a sale, as by the actual corporeal delivery of the goods for which it is substituted. Before we quit this subject it may be as well to mention that besides these public warehouses, there are others belonging to individuals, who derive a profit, as *warehousemen*, from permitting the deposit, and undertaking the safe custody of goods, which it may not be convenient for the owner immediately to dispose of.

The incidents which belong to the transfer and *delivery* of commodities, with the various mercantile occupations thence arising, have now been noticed as accurately as the narrow

limits of an article permit. It follows that we glance as cursorily over those which relate to the *payment*. The basis of traffic being, as we have said, reciprocity of advantage, it might be expected that no one would be willing to part with the possession of his goods without securing an immediate equivalent. It was on this natural supposition that money was introduced; and without doubt the invariable practice anciently was, as the general rule still is, that payment should be contemporaneous with delivery. Various causes, however, of which it is enough to particularise competition, and the insufficiency of the actual currency for the increasing transactions of trade, gradually introduced the system of *credit* — and it has now become in many branches of trade, an established usage, in all it is a frequent practice, to allow an interval between payment and delivery, either fixed by the terms of the bargain or the understood course of dealing, or left in some degree to the discretion of the parties. In giving credit the seller parts with goods, trusting in the will and ability of the buyer to pay the price of them at some future time. When, therefore, it is considered how often the will is tainted with dishonesty, and the ability affected by unforeseen contingencies, it is easy to perceive how frequent occasion must be given to the interference of municipal authority. Accordingly, we shall find that a great part of the code of mercantile jurisprudence is occupied with the various modes of enforcing payment, or obtaining in some way remuneration to the creditor. It happens, not unfrequently, that the tradesman, not considering the buyer trustworthy, refuses to give him credit, except upon the *guarantee* of some third person, who makes himself responsible for the debt, in case of the buyer's default. And that no undue advantage may be taken of promises hastily and incautiously made by persons, whose only interest in the transaction was, perhaps, a wish to do a friendly office, the legislature requires among other things, that this pledge, in order to bind the party giving it, shall be in writing.

It would obviously be desirable for the tradesman who had given credit for goods, to obtain from his debtor a distinct promise to pay the sum actually due, with an acknowledgment that he had received the value for it. Such a promise,

reduced formally into writing, and signed by the debtor, would at once dispense with all proof of the items composing the demand, and of the price and delivery of the articles. Hence, probably, the introduction of *promissory notes*, the form and effect of which is precisely what we have stated. He who gives the note is called the *maker*; he in whose favour it is given, the *payee*. As to the period of payment they vary; some being due on demand, others at the expiration of a specified time from the date. But there is another advantage attending these securities, of at least equal importance with those which have been mentioned. In a trading community, where the quick return of capital is a matter of great consequence, it is evident that independently of the risk incurred by giving credit, a partial loss would be sustained by the mere *delay* of payment, unless it were in some way provided against. A profit may be obtained from the employment of money; and he, therefore, who advances it to another, or, which is in effect the same, forbears to call for it when due, is entitled to receive from that other such a remuneration as the use of it for the time would be worth. This remuneration, which is known by the name of *interest*, like the profit upon *all other* commodities, would vary, if left to its own operation, according to the value of money in the market. It has been found expedient, however, to limit it by law to the rate of five for the use of every 100 for one whole year. Now by means of a promissory note the creditor has it in his power to stipulate for the payment of interest as well as principal, and in general takes care so to express it in the body of the note. Even when he omits to do so, the law taking notice of the usage, assigns it as due; where the note is made payable on a day certain, from that day; where it is made payable on demand, from the time of demand. But though a good and valuable security for his debt, a promissory note was no further available to the holder for the purposes of commerce. Originally the maker was liable to none but the payee. The instrument was not transferable, and therefore not convertible into cash. Nevertheless, by degrees the practice grew up of passing it from hand to hand, and assigning over (of course in consideration of some equivalent) all

its rights and liabilities to the holder for the time being—a practice which, though long discountenanced by the law, at length received a statutory sanction.

The practice of negotiating promissory notes was derived from that which had always prevailed as to another and more important instrument, long introduced into commercial transactions under the name of a *bill of exchange*. This may be properly described as a written order or request, addressed by one person to another, directing the latter to pay on account of the former, to some third person or his order, a certain sum of money at a time therein specified. The person who gives the order, is called the *drawer* of the bill; he to whom it is directed, the *drawee*; and he in whose favor it is made, the *payee*. It is made payable either at sight, or at so many days or months after sight, or at so many days or months after date. It is called a *foreign* bill when drawn by a person resident abroad on his correspondent in England, or conversely an *inland* bill, when both parties reside in this country. In drawing foreign bills of exchange, it is customary to give two or three of the same tenor and date, to guard against unforeseen but probable casualties; in which case it is mentioned in the body of the bill, that it is the 1st, 2nd, or 3d bill of exchange, either of which being paid, the rest become void. It is generally said that bills of exchange were invented by merchants resident in different countries, for the more easy and safe remittance of money from the one to the other, and that from thence it was subsequently extended to commercial transactions within this kingdom.<sup>1</sup> Undoubtedly the method is not indigenous with us, and seems to have been borrowed from countries which preceded us in the pursuit of commerce. Its usefulness also as a mode of remittance is sufficiently evident; for to take the instance given by Blackstone, “If A. live in Jamaica and owe B. who lives in England 1000*l.*, now if C. be going from England to Jamaica, he may advance B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither: thus B. receives his debt at any distance of place by transferring it to C., who carries over his money in paper credit,

<sup>1</sup> 2 Blac. Com. 460, 7.

‘without the risk of robbery or loss.’<sup>1</sup> Still it is more probable, that the practice of using bills for foreign remittance was an extension of that which already prevailed in inland transactions, than that this latter was adopted from the example of the former. Nothing could be more natural, when the system of credit was once established, than that the trader, whose available funds might not be sufficient to pay ready money for a commodity which he was desirous of purchasing, should tender to the seller an order for payment on some other on whom he had a claim to an amount covering the price of his present purchase. By this contrivance the seller had also an additional security for the payment. It was probable the drawee might honor the bill, and at its maturity, pay the money; and if he did not, the drawer would still be liable for the amount. It afforded him also an expeditious and summary remedy against the latter; for as in the case of a promissory note, so in a bill of exchange, it is unnecessary to prove the consideration for which it is given. Of course the payee would take an early opportunity of ascertaining from the drawee, whether he would undertake to satisfy the bill at the expiration of the specified time. If he consented, and signified his acceptance, either by writing upon the bill or otherwise, he was then termed the acceptor, and immediately became liable as such for the amount, not only to the payee, but to the drawer also, whose title to give the order he by this act admitted. Precisely in the same manner as the payee had been induced to take this bill or order in payment, another might be willing to accept it from him in the purchase of other commodities, and as it purported to be payable to his *order* as well as to himself, he signified that order by the indorsement of his name. The bill might thus be passed from hand to hand, and would increase in value by each successive transfer, inasmuch as the holder had a claim, not only upon the original parties to the bill, but also on every preceding indorser, each of whom guaranteed the payment of all who followed him, in case of default by the person primarily liable. Though the payee in general, as we have said, presents the bill for acceptance, yet where distance or other causes interfere to prevent this, any subsequent

<sup>1</sup> 2 Blac. Com. 460, 7.



holder may do so at any time during the period of its currency. Occasionally when the drawee refuses to accept, some other person, not a party to the bill, for the credit of the drawer, or some one of the indorsers, voluntarily undertakes to pay it when at maturity; such person is termed an *acceptor supra protest*, or more generally an *acceptor for honor*, and becomes responsible to all whose claim upon the bill extends to the party for whose honor it has been accepted. Originally, perhaps, the use and operation of bills of exchange were confined to the case which we have supposed; but as the transaction was founded on a supposition that the drawee either had in his possession funds of the drawer, or was in his debt to the amount of the sum specified, it was by no strained application that it became usual in the bargains of commercial men, for the seller to draw a bill on the buyer, payable to his own order, for the price of the goods sold, which bill the latter immediately accepted. The effect of this arrangement, which is now frequently adopted is this: — The buyer is not called upon for actual payment in cash, until the maturity of the bill; or in other words, he has credit for that time, whilst at the same time the seller has not only an available security for his debt, but can at any time, by indorsing his name, and thereby adding his own guarantee, dispose of the bill and convert it into value. Neither was it any great stretch of the principle of these negotiable securities, that one, who had consigned goods to another to be sold on his account, should draw, and that the consignee should accept, before the goods were disposed of, perhaps even before they were received, bills for a sum short of their estimated value, on the reasonable supposition that before they became due, the acceptor would have procured by the sale funds adequate to meet his liability. Thus far the use of bills was certainly natural, and perhaps warranted by general convenience. But the facility of negotiation has given rise of late years to practices which are not only a departure from the original purpose of these useful instruments, but which are liable also to an abuse, injurious to the real interests of trade. It has been already said that the use of money for a given period is always of some value in the market; and where, as in this country, it is plentiful,

persons are always to be found who are willing to advance it for the sake of the interest. Now to give cash for a bill not due, is in effect to advance so much money, and the person cashing it is entitled to interest for the time which must elapse before it becomes due. Subject, therefore, to the deduction of this sum, which is termed the *discount*, the holder of a good bill may at any time obtain the value of it in specie. Thus by an easy transition it becomes an instrument for the raising of money: for suppose A. wishes to procure 100*l.* but is conscious that his own credit is not sufficient for obtaining it by loan, he applies to some friend whose credit stands higher, to accept a bill drawn by himself, payable perhaps at the end of three months, undertaking either to supply the funds necessary for paying it when due, or in the meantime to provide for it in some other way. The bill so accepted (and which, from the mode of procuring it, is called an *accommodation bill*,) he now takes to some monied man, who cashes it, and thereby puts him into immediate possession of the sum wanted, *minus* the small deduction for discount, or in other words, lends him that sum for three months upon the personal security of the acceptor and himself. This may serve as one instance out of many; for to enumerate all the purposes to which bills of exchange are made subservient would exceed our limits. Suffice it to say, that they enter into almost every transaction of trade, and are not only, as was their original intention, the ordinary instruments of payment, but the general media for the procuring of temporary loans.

Bills may of course be cashed by all who have money at command. There, is, however, a distinct class of men, whose peculiar business it is to deal with money as an article of profit. The origin of *bankers* seems to have been twofold. In the insecurity of property which prevails in countries imperfectly civilized, it was a natural and very common practice for those who had accumulated a sum of money to place it for safe custody in the hands of some opulent tradesman of undoubted credit. Of course he would not suffer the money to be idle, but would employ it as capital in trade, taking care to retain in his hands sufficient to answer the calls of the

owner. At the same time the extravagance and necessities of the landed proprietors continually compelled them to borrow from the wealthy tradesman, even at an exorbitant rate of interest. By degrees also the monied men found it equally advantageous, without embarking in trade themselves, to lend out capital to others who were willing to do so, upon such terms as might enable both to derive a profit from the employment of it. A separation thus took place of the tradesman and the monied capitalist, and the receiving of deposits and advancing of money on security, which the latter began publicly to profess, became a distinct and lucrative business. Again, in the infancy of foreign commerce, it was usual for the merchants of different countries to repair in person to the great fairs and markets, where the principal transactions were carried on. At that time payments were made in specie, and each merchant having only the money current in his own country or uncoined metal, there was a difficulty in effecting the exchange. Hence it became a gainful trade to give the current money of the place, or such other money as the merchant might wish for, in exchange for foreign coin or bullion, and the person who carried on this traffic, having stalls or benches (*banques*) upon the places of commercial resort, were thence called bankers. Of course, if a substantial and well-known merchant applied to them for money, these men would not hesitate for an adequate consideration to furnish him with it in the way of loan, and thus by degrees the practice grew up among them of making advances on mercantile securities. But whatever might be the origin of the system, the bankers of this day form a very important section of the mercantile community. Their profit, as we have seen, is derived from the advantageous employment of capital in the way of loan; and these loans are made either on personal security by bond, grant of annuity, promissory note or bill, or on security of land by mortgage, or of goods by pledge. But the most extensive and perhaps the most profitable mode in which bankers employ their capital, is in the discounting of bills. A sketch of the mode of dealing between a London banker and his customer will at once illustrate the mutual advantages of the system, and convey the requisite information to the reader.

A tradesman makes a deposit with a banker, who thereupon enters his name in his books, or as it is technically termed, opens an account with him. Each day the tradesman sends to the bank whatever cash or bills are received in the course of his business. These are placed to his credit in account, the bills, if not at maturity, being *entered short*, i. e. in a column short of that in which the cash receipts are entered, to be carried into this latter column, if subsequently paid. On the other hand, the customer makes no payment but through the medium of his banker. If bills are brought him to accept, he makes them payable at his bankers; if payment is required in cash, he gives a cheque or order upon his banker for the amount. These, when presented at the bank, are immediately honoured, and the sums paid upon them are debited to the customer in account. Again, if the latter wants cash for a bill, he sends it to the bank, where it is immediately discounted. If his credit be good, the banker will even permit him occasionally to over-draw his account, taking his promissory note or bill for the balance. These securities again he will renew, when at maturity, by taking a fresh note or bill, with this difference only, that this latter he cashes, and debiting his customer with the bill due, he places to his credit the sum for which the substituted bill is drawn *minus* the *discount*, which constitutes his profit in the transaction. When, however, the balance is considerable, he requires further and more effectual security, either by mortgage, or more generally by pledge. Thus it is that the holder of a bill of lading a dock-warrant, or other instrument of a like nature, frequently deposits it with his banker on account of advances either made or to be made; for as the property which these documents represent cannot be transferred without the possession of them, they are an effectual security for repayment to the amount which that property is worth. Thus the banker has the use of the floating balance, when it is in his favor, and the profit to be obtained by discounting: the customer, besides the regular keeping of his accounts, has the advantage of safe custody for his money, the convenience of remittance, and a ready means of obtaining cash when he is in want of it. The transactions of London bankers, though necessarily much

complicated, are carried on with great punctuality and exactness. They are also considerably simplified by a method which they have by common consent adopted, called *clearing*, which method is this :—At half past three o'clock a clerk from each banker attends at a place called the clearing-house, where he brings all the drafts on the other bankers, which have been paid into his house that day, and he desposits them into their proper drawers (a drawer being here allotted to each banker); he then credits their accounts separately with the articles which they have against him, as found in the drawer. Balances are then struck from all the accounts, and the claims transferred from one to another, until they are so wound up and cancelled that each clerk has only to settle with two or three others, and their balances are immediately paid. Such drafts as are paid into a banker's too late for clearing, are sent to the houses on which they are drawn, to be *marked*, which is understood as an engagement that they will be paid the next day.

The course of dealing among country bankers (for there are banks established in almost every provincial capital and trading town) is somewhat different; with them it is not an uncommon practice to allow an interest upon deposits, and on the other hand to charge a commission for their trouble. Again, many instead of cash issue their promissory notes payable at sight. By this contrivance (the operation of which is sufficiently obvious) they are enabled to make large advances to their customers, and by extending their dealings beyond their actual capital, to obtain sometimes an exorbitant profit. But besides all these there is a national bank, called the *Bank of England*; to understand the working of which, it is necessary to premise that the government of this country is indebted to a certain number of its subjects, in a vast sum of money, advanced at different times, to meet the public exigencies. The greater part of this debt is funded, that is, certain annual funds, to be raised by taxes upon the people, are assigned in perpetuity to pay the interest of it. It is through the medium of the Bank of England that this interest, or, as it is generally termed, the dividends upon these funds, are paid to the public creditors, in proportion to their respective shares in the stock.

The shares are transferable, and consequently whoever is desirous of investing a sum of money in government security for the sake of the interest which it bears, may do so by purchasing from a proprietor of stock such share as he may want, at the price which it is then worth in the market. Of course the value of a share fluctuates with the state of the security, and is consequently affected by political incidents. Hence it has become a practice to traffic in the buying and selling of shares,—a practice which has received the appropriate name of stock-jobbing. The wants of government in their ordinary expenditure also not unfrequently anticipate the annual income. In the interval, therefore, between the voting and the raising of the supplies, money is procured, when necessary, upon the faith of the funds assigned, by an issue of *exchequer bills*, i. e. of orders upon the Treasury, to be paid when the money raised from the taxes is brought in. For these bills the Bank of England gives cash, deducting a discount, calculated upon the probable period which will intervene before payment. But its transactions are not confined to dealings with the government. It has private accounts also with individuals of unquestionable credit, and for such does not refuse to discount ordinary bills of exchange. Its chief profit, however, arises from its large issue of promissory notes; and such is the universal confidence in the stability of the institution, that these are everywhere received as readily as specie, and form a very considerable part of the circulation of the country. We have no space for details, which might be carried to an almost indefinite extent; and here therefore we shall conclude this short and necessarily imperfect account of the modes and instruments by which payments are made, and money transactions in general carried on in this great and busy commonwealth.

For the sake of distinctness, we have all along supposed these various negotiations to be carried on immediately between the parties directly interested. It must, however, have been obvious that transactions so extensive between persons removed at great distances from each other, could not be managed either so conveniently or so beneficially without the intervention of some third party between the principals in the

contract. To conclude bargains with advantage, it is necessary to be always on the spot, to catch the favourable turns in the market; whilst on the other hand the superintendence of a large establishment forbids the frequent absence of the proprietor. Again, in foreign trade it is desirable, if not indispensably requisite, to have agents resident abroad, to receive consignments of goods exported, to dispose of them advantageously for the owner, to purchase and ship off such foreign commodities as he may want in return, and to make and receive the necessary payments and remittances. It may readily be supposed, therefore, that mercantile agents have long constituted a separate and important class. These, under the general name of brokers, comprehend several distinct kinds. Those who are concerned in the sale and purchase of commodities, are either *brokers* specifically so termed, or *factors*. The former have not the possession of goods, but simply conclude the bargain in the name, and on the account of some other person. When the agreement for sale or purchase has been made, the broker gives to the seller a memorandum of the sale, to the buyer a memorandum of the purchase, and the delivery of these notes (which are called *bought* and *sold* notes) at once binds the bargain, and confers on the principal the same rights and liabilities, as if the transaction had been carried on by himself in person. Factors are contradistinguished from these, principally by having possession of the goods, and dealing with them as their own, and in their own names. They are persons specially appointed to receive and make consignments of goods, on account of merchants residing either in another country, or in some distant part of the same country. In the former case they are called *foreign*, in the latter *home factors*. The direct profit of brokers and factors consists generally in a commission of so much per cent. on the amount of their sales or purchases. Occasionally, however, they render themselves answerable to their principal for the credit of the person to whom the sales are made, and are then said to act under a commission of *del credere* or guarantee, in which case an additional premium is stipulated for in consideration of the self-imposed liability. In London the brokers are licensed by the lord mayor, who administers to them an

oath, and takes a bond for the due performance of their office. In addition to these, there are *ship* and *insurance* brokers—a body of men engaged in the buying, selling, and chartering of ships, the procuring of freight, and the negotiating of insurances;—*bill brokers*, who undertake all transactions relating to the purchase or discounting of bills of exchange, whose business it is to be perfectly acquainted with the course and rate of exchange between different countries, and to facilitate the remittance of money beyond sea, by procuring in return for cash or otherwise, bills payable in the country to which the remittance is to be made;—and, lastly, there are *stock* and *share brokers*, employed, as the name imports, in the transfer of shares in the public funds, or the joint stock of a company.

We have more than once had occasion to mention the importance of capital in trade; indeed it may almost be said that the chance of profit increases in a geometric ratio to the amount of capital. It follows, therefore, that if two or more agree in investing each a particular sum in a common trade or adventure, the profit of each will be greater than if he had pursued it separately on his own individual account. Again, the management of an extensive establishment requires a combination of skill and attention; and as common sense points out that those who have a direct interest in the success of an undertaking will be more zealous in their endeavours, it seems a natural and obvious expedient to secure this union of efforts by a community of profit and loss. From these two considerations undoubtedly arose the practice of *partnerships* in trade; and so beneficial and even necessary has the system been found, that there are now few trading establishments of any magnitude in this country carried on by single individuals. A partnership, then, is a voluntary contract between two or more persons for joining together their money, goods, labour, skill, or all or either of them, upon an agreement that the gain or loss shall be divided proportionably among them. In general all the partners appear ostensibly to the world, and constitute what is called the house or firm. It is, however, by no means uncommon for monied capitalists to embark considerable sums in trade, without taking any part in the ma-



nagement of the concern, or suffering their names to appear. Such persons are called *dormant* or *sleeping* partners, and when discovered are liable in common with the rest to the creditors of the firm. There are also *special* partnerships formed for a single adventure, and the consequences and liabilities of these are confined to the transactions thence arising. The number of partners of course is regulated for the most part by the amount of capital, and the degree of active exertion required. Hence, when undertakings have been projected of such magnitude as to call for an extensive combination of means, large partnerships have been formed, under the name of *companies*, for the prosecution of the design. In this way it is that great public works, alike useful to the community, and profitable to the adventurers, have been planned and executed, not, as in other countries, by the act of government, but by the voluntary efforts of individuals. It is to these that we are indebted for our admirable canals, magnificent bridges, roads, docks, piers, and other monuments of the wealth and greatness of England. By companies lands have been colonized, dominions acquired, and commerce spread into the remotest corners of the earth. But we are warned to withdraw from a topic, on the advantages and abuses of which we could gladly dwell. It is time we should hasten to a close; and we shall therefore content ourselves with observing, that of these companies some are formed and regulated by deed entered into by the parties, and are in fact no other than extensive partnerships; and that others are incorporated either by act of parliament or royal charter. Of the former are most of the companies established for the working of mines, whether in England or abroad, or for other speculations of a like nature. As instances of the latter, it will be sufficient to mention the different dock companies, the Bank of England, and the East India Company. It would be impossible here to enumerate the details of management and the different privileges of each of these important bodies. Thus much, however, is common to all. The capital in all is divided into a certain number of shares, in general transferable, whereof each partner may hold one or more, up to a specified limit, and

in all the management of the company's affairs is committed to a body of directors chosen periodically from the proprietors at large.

We have now completed the sketch which we promised of the progress and operations of trade ; and though in a subject so comprehensive, much has necessarily been omitted, and much left imperfect, yet upon the whole, perhaps it will be found sufficient for the purpose which we have had in view, of conveying to the student a clear and accurate notion of the connection and principles of the whole.

[The first Number of a new series of Reports has just appeared, well meriting the attention of those whose engagements render an acquaintance with mercantile law necessary or expedient. (Reports of Cases relating to Commerce, Manufactures, &c. determined in the Courts of Common Law. By F. M. Danson, and J. A. Lloyd, Esquires of the Inner Temple, Barristers at Law. Part I, price 4s. Benning, 1828.) These Reports are exclusively devoted to commercial questions, and the experiment has shewn that, though it may now and then be difficult to draw the precise line of distinction between a case of mercantile and a case of general law, it is quite possible to form a collection, which many men may be glad to purchase who would not go to the expence of the numerous volumes through which the same cases must otherwise be sought. So complete is now the division of labour amongst lawyers, that many barristers have made mercantile law their peculiar, if not exclusive, study ; whilst solicitors in trading towns are obliged to have it at their fingers' ends. To such these reports will be found particularly serviceable, as the points are clearly brought out, analogous cases accurately subjoined, and full notes added when a decision appears to vary from principle or authority. They are also devoid of the surplusage, by means of which the generality of reporters contrive to levy a tax on the profession.]

We take this opportunity of mentioning that the practice of inserting irrelevant matter to add to the length of the report, has been universally complained of, and that we have been very frequently requested to expose it. We have consequently collected some specimens, and shall give them in a future Number.—*Edit.*]

## ART. IV.—ON CONVEYANCING.

No. II.—*With some Preliminary Remarks on Mr. Burton's Elementary Compendium of the Law of Real Property.*

BEFORE we enter on the subject of this article, we must pause to notice a work which has appeared since our first number, and forestalled our endeavour to fill up the vacant space between Blackstone and other text writers on real property. This is Mr. Burton's avowed design in his "Elementary Compendium;" but still we shall go forward and give our reason for so doing. His treatise on the whole is meritorious. It evinces industry, and is in general perspicuous and precise. Unlike the vast majority of cotemporaries the author has sought throughout, not to swell, but to contract its bulk; and it is really an instance of felicitous compression; but yet,

(" But yet is as a gaoler to bring forth  
Some monstrous malefactor")

however useful in some respects, it is in others so defective that we cannot but think it fails in its proposed object. The learned author would distrust our statement if it rested in generals, and standing as we do in regard to him, we cannot conceal the grounds of it. In a work like this, the production of a scholastic lawyer, we expected a systematic arrangement, as the most obvious and almost the only means of giving the student additional facilities is by methodizing more justly than preceding writers. From this there is ample room in consequence of most modern treatises of a similar character having been formed too servilely on ancient models, while new materials are multiplied, and the subject has changed its shape and in some respects its very nature. But Mr. Burton

has, we think, gone to the opposite extreme, and rejected the standard classifications of antiquity, without supplying their place by a logical or (so far as we see) even regular plan. Take a specimen of his manner. He sets out with "Fee-simple," and lumps under it all the modifications of which any freehold is capable; all the properties of all the assurances by which any freehold is transferable. When we traced his first chapter's train of propositions, from "alienation at common law," to "evidence of pedigree," we thought of Berkeley's beginning with tar-water, and ending with the Trinity. Certainly he should have known that in treating of individual subjects, he should confine himself to their individual peculiarities.

It is from Mr. Burton's neglect of method, that we conceive him to have left the course free for those who entertain the design which caused his undertaking. We must be permitted to observe, however, that he is not uniformly accurate in his details.

Thus (p. 13, 14.) he says, "No one can have a reversion or remainder without a particular estate being vested in some *other person*." The author at the moment had of course forgotten the particular estate which the statute *de donis* created. But (to waive the instance of an estate tail) if lands are granted to A. for life remainder to him for years, the remainder is good.—(Co. Litt. 54 b.)

We shall also notice a mistake of practical moment. Mr. Burton lays it down without qualification, that "copies of court rolls are liable to the stamp duties;" and that "the copy of a surrender for the purpose of sale or mortgage is charged with the ad valorem duty."<sup>1</sup> We gladly prevent him from being the unintentional cause of a grievous error to the practitioner who consults his work. The ad valorem duty is always on the principal instrument, which the stamp act declares that the *surrender* if made *out* of court, or the *copy of court roll* if made *in* court, shall be deemed.<sup>2</sup> Mr. Burton observes, "in other cases generally the copy of every surrender is charged with 1*l*."

Here again he is mistaken; for the above-mentioned dis-

<sup>1</sup> P. 408.

<sup>2</sup> 56 Geo. 3. c. 184.

tion is continued, and the stamp is to be on the surrender if made out of court, or on the *copy* if made in court.

We have room but for one comment more. Speaking of mines unopened, he says, "Until reduced into possession, the interest therein so far resembles a remainder, as not to be liable to dower; and *for the same reason may perhaps be considered as lying in grant.*"<sup>1</sup> But the exemption of this interest from dower, instead of demonstrating that it lies in grant, or (what is the same thing) that it is an incorporeal tenement, makes it an anomaly; for advowsons, tithes, rents, &c. are all incorporeal tenements, and lie in grant, yet are all liable to dower; and remainders and reversions are exempt from it only when expectant on an estate of freehold, and then in consequence of a peculiar rule in no wise connected with their lying in grant.<sup>2</sup>

But these are minor blemishes to which all legal writers are subject, and might well have been overlooked, had Mr. Burton succeeded in a logical and luminous distribution of his topics. Still, however, we recommend his treatise, both to the student and the practising conveyancer, as containing a mass of useful matter, which though in an unscientific, is nevertheless in a compact and tangible form.

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The law of real property must in every age and country be susceptible of one classification, viz. into "*the subject matter*" and "*the interest.*" And fortunately this natural and obvious division is, at the present day in England, far more important than the artificial ones which are connected with it. *The tenure or manner of holding*, for instance, though not defunct, but occasionally called into action by the doctrines of forfeiture and escheat, &c., and still partially operating in our various copyhold manors, is nevertheless of comparatively little amount. Its importance, except in manors, which continue to bear the impress of feudality, ceased

<sup>1</sup> P. 361.

<sup>2</sup> This seems to be case; See *Stoughton v. Leigh*, 1 Taunt. 401. But we cannot discover the ground of the distinction.

with the singular system of which it formed the foundation, and indeed the essence. And our ancient tenures and modern doctrine of estates are not, we think, so closely connected, as to render a previous knowledge of the former necessary to an acquaintance with the latter. We have already hinted<sup>1</sup> that nothing is further from our intention than to throw a shadow of disrepute on the antiquarian researches of the juridical student; but we would have him regard the study of feuds, and their offspring, ancient tenures, in that view, rather than as the only or even most eligible entrance to the modern system.

In giving, therefore, a series of elementary papers on conveyancing, we shall not go back to tenures,—partly from the reason given, partly because no modern can hope to throw additional light on a subject, already so strongly illumined by talent and learning, as the doubtful gloom of remote antiquity will admit. To those who desire an acquaintance with feuds and tenures, we shall recommend the few chapters thereon in Blackstone, in which he has displayed to the greatest advantage his happy talent for depicting the state of municipal law; Sir Martin Wright's instructive work, to which Blackstone was chiefly indebted; and the learned notes of Hargrave and Butler to the First Institute. We are moderate in our recommendations, and shall not imitate those judicious monitors who would have seized the occasion to produce an idea of their prodigious erudition by a formidable catalogue of the writers on feuds and tenures. We repeat, that we address the young conveyancer as such, and with justification, if any be needed, for abstaining from a vain parade, we shall proceed at once to the topic we propose to discuss.

Following our primary division, we shall first call the student's attention to the *subject matter* of this branch of our law or *real property* itself, which consists of land, and of all rights and profits arising and annexed thereto, that are of a permanent and immoveable nature. It is usually comprised under the words lands, tenements, and hereditaments. The first of these has most intrinsic worth, been indeed the basis

<sup>1</sup> Ante, 62.

of almost all the others. In the earliest times, when every thing else was looked on with comparative disregard, we find it to have drawn considerable attention; and, in truth, its stability and permanence, its consequent capacity for transmission to those whom the owner contemplates with natural affection, together with its admirable aptitude for exalting its possessor in the estimation of mankind, must always be qualities peculiarly attractive. In the first ages of the feudal system, those fleeting objects termed *personalty*, were insignificant to the rude people of northern Europe; and though we learn that they anxiously endeavoured (at least in some countries)<sup>1</sup> to prevent a permanent property in land, from a fear that local attachments and the luxury of wealth would soften the spirit of warfare, and engender a distaste for predatory migrations; yet no sooner had society assumed a somewhat regular, and feudal jurisprudence a scientific, form, than those primitive institutions which confined the tenant's interest in land to a fixed and brief period, rapidly yielded to those general principles of human nature which they before had violently opposed and suspended. For some time *land alone* continued to be chiefly regarded by that refined and subtle body (the clergy) on whom the cultivation of the feudal law devolved, as soon as it began to change from a military to a civil system; and in England we find our early common law annexing not merely importance to the substance of land, but an immense comprehensiveness to the very term. It comprised all that range of objects which are called corporeal hereditaments; in a word, every thing terrestrial.<sup>2</sup> A castle, a messuage or a manor, might all be granted by their specific titles, but they would likewise all pass under the general denomination, land. Such at an early period was our law, and such it still is. Indeed with respect to buildings, no violence is done to the natural meaning of the word "land," as a right to the soil generally supposes a right to the structure thereon; for *cujus est solum ejus est usque ad calum*. This, says Blackstone, is the maxim of the law upwards.<sup>3</sup> It, how-

<sup>1</sup> *Arva per annos mutant*, says Tacitus of the Germans, c. 26.

<sup>2</sup> Co. Litt. 4, 5, 6.

<sup>3</sup> 2 Com. 18.

ever, has some obvious exceptions. Thus a freehold may exist distinctly in an upper chamber, and it lies in livery;<sup>1</sup> and though this position has been denied on the ground that if the foundation fails, the chamber is gone,<sup>2</sup> we apprehend it to be clearly law. With respect to the maxim downwards, "Whatever," continues Blackstone, "is in a direct line between the surface of any land, and the centre of the earth (*usque ad orbem*, as our chimerical forefathers expressed it) belongs to the owner of the surface, as is every day's experience in the mining countries."<sup>3</sup> But the truth is, that as to this downward right, the ancient maxim, instead of being what an axiom ought to be, an universal, is true only as a general rule. For instance, a demise of a yard would not, contrary to the intention deducible from the instrument, pass a cellar situate underneath the yard.<sup>4</sup> Again, mines of gold and silver belong by royal prerogative to the crown.<sup>5</sup> And, indeed, instead of the experience of the mining countries exemplifying the invariable applicability of this principle, we there most frequently find exceptions to it, and for a reason which will appear hereafter. Such was and still is the doctrine on this subject. But no sooner were estates allowed in material subjects, than a new and more refined species of ownership sprang up, and was put in most respects on the same footing with land, which with a few exceptions formed its basis.

Things which were not objects of sensation were allowed an inheritable quality and all the other privileges of ownership; and these things when inheritable received the generic title of incorporeal hereditaments; and from the exact and logical manner in which the ownership they were capable

<sup>1</sup> Co. Litt. 48. Touch. 202.

<sup>2</sup> Brook. Abr. tit. Demand. pl. 20.

<sup>3</sup> 2 Comm. 18. Notwithstanding the numerous editions of the Commentaries, the errors of the second volume remain for the most part uncorrected, and even unnoticed. In this series of papers we shall, therefore, keep it in view, and endeavour, if possible, to increase its utility. We are happy to perceive that in the edition now preparing for publication, the second volume has been committed to a gentleman whose avocations as a conveyancer must have given him a more familiar acquaintance with real property than his predecessors possessed. (The gentleman, here alluded to, has since seceded from the undertaking.)—Note to second edit.

<sup>4</sup> 1 Term Rep. 701.

<sup>5</sup> Plowd. 336.



of was framed,—with an accurate analogy to the pre-existing doctrines on corporeal hereditaments, except when the ideal nature of the subject matter required the resemblance to stop,—we are led to form no mean idea of our ancient jurists. Thus, for instance, the primitive mode of transferring land by livery of seisin or actual delivery of the possession, naturally produced the rule that a freehold estate should not commence *in futuro*;<sup>1</sup> but the reason (at least the technical reason) of this rule is of course restricted to such hereditaments as lie in livery;<sup>2</sup> yet the courts, desirous at once to preserve an analogy, and confine it within proper limits, applied the same rule to incorporeal hereditaments, except when they were not in esse or existence.<sup>3</sup> We shall, hereafter, give a more substantial reason for this extension and qualification of the rule we have alluded to. It is not our design to enter into the individual nature of each of those objects which the law considers as incorporeal hereditaments; as we should be then but superfluously presenting to our readers what they may find already in standard treatises under a sufficient variety of shapes.<sup>4</sup> We shall, therefore, confine ourselves to general observations applying equally to them all, except when from its peculiar nature any one of them may form an exception to the rules we may lay down.

Let us begin with stating the true criterion of an incorporeal hereditament; as nothing but a simple and tangible test of its nature can ensure an accurate classification. Lord Coke defines an incorporeal hereditament to be a right (he should have said *inheritable* right) issuing out of a thing corporeal (whether real or personal), or concerning or annexed to or exercisable within the same.<sup>5</sup> This definition, at least with the addition we have presumed to make, is undoubtedly just, and embraces every species of incorporeal hereditaments with logical precision; but that it does not form the test we alluded to, seems clear, we think, from the imperfect idea which Blackstone himself evidently had of them. That celebrated writer quotes this definition,<sup>6</sup> and

<sup>1</sup> 2 Black. Com. 165.    <sup>2</sup> This seems to have escaped Blackstone; vid. ib. & 166.

<sup>3</sup> Bro. tit. Grant, 86. Plow. 156. Palm. 29, 30. 2 Vent. 204.

<sup>4</sup> Vid. Touch. c. 12. 2 Sand. Uses, 25, &c. 2 Com. 20.

<sup>5</sup> Co. Litt. 19, 20.

<sup>6</sup> 2 Com. 20.

then employs his ingenuity in describing with metaphysical subtlety, the airy substances of which he is about to treat. "Their existence," says he, "is merely in idea and abstracted contemplation;" they "can never be the objects of sense," &c. and, taking the instance of an advowson as a complete illustration of their nature, he observes (after some similar remarks on it) that "it can be only conveyed by operation of law, by verbal grant, either oral or written, which (says he) is a kind of invisible mental transfer."<sup>1</sup> When we reflect on this position, which has been noticed as incorrect by most of the editors of the Commentaries, its absurdity is manifest; and whoever reads the highly wrought description in which we find it, will perceive that the author's fancy was at work, and pushing the process of metaphysical abstraction in reference to incorporeal hereditaments, farther than any sane legislator could possibly have intended. The common law had a very different view from that of the learned commentator. Its object, which was connected, indeed identified, with the sound principle of social expedience, was to give the most authentic and overt evidence possible of the transfer of an incorporeal hereditament. Hence, when the subject was corporeal, livery of seisin was necessary, and when incorporeal, a deed.\* And though the latter ceremony was less public than the former, it was in early times almost as solemn, and at no period of our law could an incorporeal hereditament have passed without it *inter vivos*. And as the instrument appropriated to the transfer of such an hereditament is called a grant, and a grant in its strict and proper sense must therefore be a deed, incorporeal hereditaments are said to lie in grant. Hence we obtain their true criterion, and by an obvious application of it, we instantly perceive what subject-matters are classed with propriety under the present division of the law of real property.

We may, therefore, lay it down universally, that whatever lies in grant is incorporeal; and one of the first remarks to which our position naturally gives birth, is the incompleteness of Blackstone's classification. "Incorporeal hereditaments are," says he, "principally of ten sorts: advowsons, tithes, com-

<sup>1</sup> 2 Com. 21, 22.

\* Vide Touch. 228. & c. 12. *passim*.

mons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.”<sup>1</sup> But two were still remaining, far more important than any he has particularized; and strictly falling, not merely within the above test, but within the definition which he has extracted from Lord Coke and adopted, — we mean remainders and reversions. It would certainly have been inconvenient to have *treated* of those interests as a species of incorporeal subject-matter; but they ought to have been *mentioned* as such. The truth is, however, that although the learned judge has subsequently classed them with advowsons, &c. when he had before him the authorities relating to *grants*,<sup>2</sup> his ideas on the point were throughout confused. We will prove our assertion by two quotations: a little before he speaks of livery being made to a remainderman on the creation of a freehold remainder after a lease for years in being.<sup>3</sup> Now in addition to this case. being opposed to two fundamental rules in the doctrine of remainders, viz. first, that the remainder must be created together with the particular estate at the same time; <sup>4</sup> and, secondly, that when the particular estate is a term of years, “the livery is to be made to the lessee,”<sup>5</sup> it demonstrably militates with those simple principles into which it is resolvable. For as soon as the lease for years was created, the grantor had only a reversion,<sup>6</sup> and whatever modifications he might choose that to undergo, its incorporeal nature remained, and, with *reference to those modifications*, it consequently lay not in livery, but in grant. What Blackstone has called a remainder in this case would be the inefficient attempt of a reversioner to create a freehold *in futuro*: the livery would be as idle as if the subject were an advowson. Again, “Where,” says he, “lands are out on lease, though all lie in the same county, there must be as many liveries as there are tenants.” But this position, though not strictly erroneous, (as we shall presently see) is

<sup>1</sup> 2 Com. 21.<sup>2</sup> 2 Com. 317.<sup>3</sup> 314, 15.<sup>4</sup> Co. Litt. 49 a. 143 a.<sup>5</sup> Ibid. 49. b. This is the authority relied on by Blackstone. We have diligently compared his inference with his premises, and we submit that it is not only unsupported by, but at variance with them.<sup>6</sup> Vid. Litt. s. 60. If our readers compare the passage in Blackstone with the last paragraph of Coke’s commentary on this section, they will see how the former was led into the error we have commented on.

adapted to mislead; for if the lands are out on lease, the grantor is seised of a reversion, and even in times of feudal rigour, all which the law required was, that the attornment of the tenants should accompany the grant. And now, since the abolition of attornments, a reversion, though expectant but on a tenancy from year to year, will pass by a grant alone;<sup>1</sup> a well-established point, and universally acceded to, except by Mr. Fearne, who strangely contended, as we have elsewhere noticed, that when a reversion is granted for a valuable consideration, the conveyance is a bargain and sale, and ought to be enrolled.<sup>2</sup> But his argument, we believe, never in the least influenced practice; and most of our text-writers on real property have dissented from his opinion when they have had occasion to touch on the grantability of expectant interests.<sup>3</sup> We must, however, notice here that the law distinguishes between reversions expectant on freehold and those which are expectant on chattel interests. The former lie only in grant, and are, therefore, purely incorporeal. The latter *may* be conveyed by feoffment with livery with the consent of the tenant, if he is in possession, or without his consent if he is not,<sup>4</sup> and hence are of a mixed nature.<sup>5</sup> This is a consequence of the originally precarious and inferior quality of estates for years.

We may then conclude that (subject to this qualification) reversions and vested remainders are incorporeal hereditaments. But by reverting to the same test we shall see that no other species of expectant interests fall within the same denomination; for an expectant interest which is not a reversion or vested remainder must be either a contingent remainder, or an executory devise; and neither of these is transferable by grant, or, indeed, regarded as a tangible subject-matter.<sup>6</sup> With this remark let us return to the general doctrine.

It is observable that there are some kinds of incorporeal

<sup>1</sup> Doe dem. *Ware v. Cole*, 7 Bar. & Cresw. 243.

<sup>2</sup> Vid. sup. 122.

<sup>3</sup> See 2 Sanders, *Uses*, 36, 39.

<sup>4</sup> Cp. Litt. 48 b. 52 a.

<sup>5</sup> Ibid. 332 b.

<sup>6</sup> Fearn. 366. 1 Sand. *Uses*, 108.

property, which, speaking generally, the policy of the law does not permit to be transferred, as offices of trust and confidence.<sup>1</sup> Still, however, these are not exceptions to the rule by which we have proposed to try incorporeal hereditaments; for though, when in existence, those confidential ownerships are alienable, they can be created only by a *grant*; and when (as for the most part they may be)<sup>2</sup> they are made transferable by the language of the instrument which created them, *i. e.* by an express limitation to the heirs or assigns, a solemn deed or grant must be adopted for the purpose.

There is one sort of incorporeal hereditaments which is not adverted to in the older elementary treatises, and which in truth seems not to have been recognised as such until modern times; we mean easements. We think, however, that it may now be laid down that an easement or privilege concerning land, but not creating an interest therein, may be an incorporeal hereditament. The Court of K. B. appear to have proceeded on this broad principle, in a modern case, when they so determined of a drain which did not confer an interest in the land.<sup>3</sup> We may consider this decision as favourable to the distinction which Mr. Preston, in regard to mines, has taken between those which are, and those which are not open, when they form the distinct and exclusive subject of a grant. The former, he properly observes, is a corporeal, the latter an incorporeal hereditament, consisting solely of the easement of mining: in the one case, therefore, the right to the soil is in the grantee; in the other in the grantor.<sup>4</sup> The right of mining, however, is not an *easement*, as it is a service with profit; whereas an easement is a service or convenience without profit.<sup>5</sup>

The other incorporeal hereditaments which may be classed under the head of easement<sup>6</sup> are private rights of way,<sup>7</sup>

<sup>1</sup> Perk. s. 99, 100. Shep. T. 239—241. 2 Atk. 14. 332.

<sup>2</sup> Ibid.; but some are essentially inalienable; e. g. the great judicial offices Touch. 239.

<sup>3</sup> 5 Bar. & Cres. 221.

<sup>4</sup> Prest. Touch. 96.

<sup>5</sup> Kitch. 105.

<sup>6</sup> 5 B. & C. 229.

<sup>7</sup> See 14 Vin. 105. Cro. Jac. 189. 5 B. & Ald. 830. 2 B. & C. 96.

rights to running water,<sup>1</sup> and rights to pews or seats in churches;<sup>2</sup> for in all these cases the soil or freehold is in another; but he who has the easement may not only justify in an action of trespass brought by the owner of the land, but may also himself, in case of a disturbance, bring an action on the case.

Having thus endeavoured to point out the various objects of ownership which fall within the title incorporeal, we shall proceed to qualify our general propositions. And first the student will observe this important point of difference between those objects and land.

Land has an inherent capacity for inheritableness, and is, therefore, essentially an hereditament; but with a few exceptions, that capacity is (to use the language of logicians) an accidental mode in things incorporeal; which, therefore, though so termed in the common parlance even of legal writers, are not necessarily hereditaments. It is true with respect to the former, that there may be none who can avail themselves of this inherent quality; and, indeed, there is but one case in which any man can; and that is when he who possesses the inheritance, is also entitled to the present ownership, of the soil; for if a particular estate is in existence it is not the *land* which descends, but an expectant interest. But the quality in the subject-matter still remains, and is ready to revive whenever permitted to do so by the restoration of the inheritance from its modified to its simple state. It may be otherwise with an incorporeal subject. A rent-charge, for instance, granted for life, never had and never can have an inheritable quality; and is, therefore, not an hereditament.

We shall now proceed to shew, by a few cases, that the test we have proposed is available for determining whether a subject is corporeal or not.

A parsonage or rectory, though it consists of nothing but tithes and the like, besides the church and churchyard, and hath no house nor glebe belonging to it, yet may be granted without deed, in fee-simple, for life, or years. So says the Touchstone,<sup>3</sup> and Mr. Preston adds the obvious conclusion that

<sup>1</sup> 2 B. & C. 686.    <sup>3</sup> Ibid. 332.

<sup>2</sup> See 5 B. & A. 356.    <sup>1</sup> Ibid. 498.    5 T. R. 296.    5 B. & C. 1.

<sup>3</sup> P. 209—229.

a rectory lies in livery. That learned writer, however, observes elsewhere, that a rectory is corporeal, because it is essential to a rectory *improprie* that there should be a glebe, or some other corporeal hereditament;<sup>1</sup> but this proposition, in which we see the logical inaccuracy of supporting what is predicated of the *genus* by a reason applied only to the *species*, is vague, and adapted perhaps to mislead the student into an opinion contrary to that expressed in the Touchstone; for it appears by the passage just quoted from that work, that a rectory lies in livery, though destitute of every corporeal hereditament except the church and churchyard, which are essentially involved in a rectory, and the freehold of which, therefore, is always in the parson. But who would suppose that these fundamental requisites to a rectory are all which the position in the Essay on Estates can include?

With respect to advowsons (which the commentator selected for illustrating his fanciful theory) we find a distinction between those which are in gross, and those which are appendant; the former being in no case transferable without deed,<sup>2</sup> the latter being grantable with the land they are appendant to, and consequently not requiring a deed.<sup>3</sup> The reason is obvious. An advowson appendant is but an accessory, and the maxim is, that *accessorium sequitur suum principale*.

As to the other incorporeal hereditaments which we have enumerated, it may be laid down universally that they cannot be granted without deed, unless when, like advowsons appendant, they are drawn along with a corporeal subject-matter to which they are accessories. This may be the case with many of them; and frequently is with ways and commons. Hence in purchase deeds of land these are adverted to in what are called the general words.

It is also, we apprehend, true generally, that incorporeal hereditaments cannot be *created* without deed. The first and obvious exception to this rule is of those which are appendant to a thing corporeal. But three other incorporeal here-

<sup>1</sup> Prest. Est. 8.

<sup>2</sup> Touch. 230. Crispe's case, Cro. Eliz. 164.

<sup>3</sup> Ibid. Co. Litt. 307.

ditaments may be created without deed; a remainder, a reversion, and a rent-service. These apparent anomalies, however, are rigid deductions from first principles. For as to the first of them, a deed is dispensed with, because by a necessary fiction the possession of the particular tenant is to many purposes the possession of the person in remainder;<sup>1</sup> whence livery to the former enures to the latter.<sup>2</sup> A reversion arises by mere act of law. And as to the rent-service, it is annexed undoubtedly not to the land, but to the reversion, which, we have seen, is incorporeal; and as the reversion is created *actu legis* merely, it is evident that the rent-service which is incident thereto, cannot require a deed. Hence when the grantor retains no reversion, he cannot reserve a rent without deed; as if a man make a gift in tail or lease for life with remainder over in fee or a feoffment in fee, reserving a rent; the rent is a rent charge, and the reservation is void unless the instrument is a deed.<sup>3</sup> This distinction, however, between a rent-service and a rent-charge did not exist at the common law, but originated in the statute *quia emptores*;<sup>4</sup> for before that enactment a feoffee held of his feoffor, and that feudal service of which rent formed a part, belonged of common right to the latter, who though he retained no reversion, still preserved the tenure or seignory to which rent might be incident in the same manner as it now is to a reversion.

But further, we may observe that a minor or derivative interest, as for instance a lease by a reversioner or remainderman, cannot be created in an incorporeal hereditament except by deed. On account whereof (we will here remark) some modern writers allege that the term lease is improper, as the instrument is a grant. But they commit a logical error; for 'grant' is the generic term of conveyance for incorporeal, exactly as 'feoffment' is for incorporeal hereditaments; and, therefore, when the ownership is specifically modified, it is equal proper in both species of subjects to give the instrument a specific name.

There are, we believe, no exceptions to our proposition; the only approach to an exception is in the case of a parson

<sup>1</sup> Vid. Bac. Abr. Rem. T.

<sup>2</sup> Litt. 60. Co. Litt. 49 a. 49 b.

<sup>3</sup> Litt. 217.

<sup>4</sup> Ibid. 216.



agreeing for his tithes with the person who is to pay them; and this is held good, not as a grant, but as a contract operating (as it is phrased) by way of retainer.<sup>1</sup> But though a parson may grant his tithes from year to year, to him that is to pay them, without any deed,<sup>2</sup> and the right conferred by that grant so far resembles a yearly tenancy of lands, that a half year's notice must be given to determine it,<sup>3</sup> yet this parol agreement can be made with no other person; nor even can the interest it confers be assigned.<sup>4</sup>

Again, it is laid down that "most chattels real may be granted without deed;"<sup>5</sup> but none of those which are derived out of an incorporeal hereditament can be so passed. Thus neither a lease for years of a remainder or a reversion,<sup>6</sup> or of tithes;<sup>7</sup> nor a next presentation<sup>8</sup> can be granted without deed.

We must now retrace our steps.—We trust that, in some measure at least, we have accomplished our proposed object, and succeeded in drawing the line plainly between the main division of real subjects, and in clearly developing their distinctive features. Should it be said that the test we have constantly been referring to, is so obvious that we need not have formally proposed it as the medium of distinguishing between corporeal and incorporeal objects, we answer, that plain as it may seem, it must have escaped not only Blackstone (or he would not have committed the errors we have noticed), but some others whose attention was more exclusively directed to the subject. Mr. Sanders, for instance, in consequence, we suppose, of confounding the generic title "*grant*" with the specific assurance which is required for the transfer of an incorporeal hereditament, has placed chattels real, title deeds, and emblements, in the same category with advowsons.<sup>9</sup>

We must now proceed to the usual classification, which, be-

<sup>1</sup> Touch. 230.

<sup>2</sup> Ibid. 230.

<sup>3</sup> See 4 Bac. Abr. 51. 6th Ibid. 768. 1 B. & S. 458. 12 East, 83.

<sup>4</sup> Touch. 230.

<sup>5</sup> Ibid. 232.

<sup>6</sup> Perk. sect. 61. Dyer, 174. Plow. 433. Co. Litt. 338. Bro. Grant, 104.

<sup>7</sup> Touch. 230. so held by Baron Denham, 2 Car. at Sarum assizes.

<sup>8</sup> Touch. 232. 1 Wood. 662.

<sup>9</sup> 2 Sand. Uses, 29—31.

sides the importance it derives from universal adoption, is still in many points material in practice. The distribution we mean is into *lands, tenements, and hereditaments*. Of the first of these words we have for the present spoken sufficiently; the others demand more particular notice. It is observable that "tenement" like "land" has a vulgar and limited, as well as a legal and comprehensive signification;<sup>1</sup> and as "land" in its ordinary and popular sense would mean no more than ground, soil, or earth, so "tenement" in its common acceptation applies only to houses and other buildings. But the legal meaning of "tenement" is that which its etymon imports—whatever, to use the language of our writers, may be *holden*;<sup>2</sup> that is, whatever may be, or rather might have been, the subject of tenure; and as things incorporeal came, when they savoured of the realty, within the scope of feudal policy, it is evident that this word is of larger extent than "*land*." Now that tenure has become an empty name, we should change this definition of its derivative, and we can effect the alteration with ease and safety, as tenements are undoubtedly co-extensive with *things real*.<sup>3</sup> An annuity, for instance, is an hereditament, but not a tenement, because it charges only the person of the grantor.<sup>4</sup> *Hereditament* is a word still more extensive than *tenement*, at least in one sense, as it embraces things *personal* as well as *real*; but when we say with Lord Coke,<sup>5</sup> that it is by much the most comprehensive expression, we must add a qualification which he seems to have overlooked. For if on the one hand there are things which are *inheritable* but not *real*, and consequently hereditaments but not *tenements*, so on the other hand there are things which *are* real but *not* inheritable, and consequently tenements, but not hereditaments. This remark we may exemplify by the case before put of a rent for life.<sup>6</sup> But further, some things incorporeal, even though strictly lying in grant, are neither tenements nor hereditaments; as for example an annuity for life.<sup>7</sup>

The last division of real property, though more artificial and less important than the other, is nevertheless material,

<sup>1</sup> See 2 Bl. Com. 16.

<sup>2</sup> 2 Com. 17.

<sup>3</sup> Co. Litt. 6a. 1 Leo. 188.

<sup>4</sup> Co. Litt. 144.

<sup>5</sup> Ibid. 6.

<sup>6</sup> 1 Prest. Est. 12.

<sup>7</sup> Ibid.

as those objects of ownership which the law recognises as *real*, have many capacities and qualities which do not belong to personal things. Thus rents are within some most important statutes (as for instance the statutes *de donis*<sup>1</sup> and the statute of uses<sup>2</sup>) which do not affect annuities.<sup>3</sup> And indeed this exclusion of annuities from the statute of uses, shows the propriety of subdividing things incorporeal into real and personal; for that statute, after a specific enumeration, adds the sweeping expression "and other hereditaments," which would, if taken abstractedly, comprise personal things of an inheritable nature. But still it was correctly held inapplicable to annuities, because it had previously confined its operation to what the grantees to uses were *seised* of; and *seisin* is the possession of a *frank tenement* or *freehold*. The statute *de donis* used only the word *tenements*, and of course therefore, no doubt could ever have arisen of its inapplicability to annuities.

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ART. V.—AN INQUIRY INTO THE VALIDITY OF THE POWER OF SALE AND EXCHANGE IN SETTLEMENTS, WHEN NOT CONFINED TO THE PERIOD ALLOWED FOR SUSPENDING ALIENATION.

MOST of our readers who have paid any attention to the law of real property, are, we presume, acquainted with the general principles of the doctrine of powers. Those who are not, can, we fear, hardly enter with us into the somewhat abstruse, but very important, topic to be discussed in this article; but to those who are tolerably conversant with the general nature of powers, we hope to be intelligible, and to produce convincing arguments in favor of our view of the subject.

But though it would be inconsistent with our limits to enter so far into the general doctrine as to enable a novice to appreciate the question we have selected, it will nevertheless

<sup>1</sup> 1 Inst. 19, 20.

<sup>2</sup> Rents are mentioned in this statute.

<sup>3</sup> Gilb. Uses, 281. Jones, 127.

be proper to premise, as the datum requisite to the argument, that a power derived from the doctrine of uses is only a specific medium of raising a use; and that the appointment in pursuance of it is nothing more than an event on which such use is to arise. That event, it is true, has peculiar effects which form its distinctive qualities; but *they* are few and definite, and all its other qualities are identical with those of any other species of event. Subject therefore to this specific difference, we may with perfect safety apply any conclusion, which has been established with respect to those events, which, in compliance with an old and somewhat objectionable phraseology, have been termed the acts of God,<sup>1</sup> to those which have been contradistinguished by the title of acts of man.<sup>2</sup> It is evident that all events which may be deemed independent of human agency are embraced by the former, and those which are dependent on that agency, by the latter class. But this classification, though it originated with that excellent lawyer, Mr. Booth, is palpably erroneous, because the latter class is intended to comprise *appointments only*; whereas it does in terms extend to *any* event which consists in *the act of man*. If, for instance, there be a conveyance to the use of A. in fee, but if B. goes to Rome, then to the use of C. in fee, the last use is evidently a shifting use dependent on the act of B., yet that act is in its effects perfectly identical with an event beyond the control of the man, as the death of B.;—on which, if that were made the groundwork of the future use, such use would arise in exactly the same way. The inaccuracy of the classification is however immaterial to the question before us, and we notice it in passing, only on account of its intrinsic importance. To our present purpose it is sufficient to say that, except so far as the law has annexed to appointments a peculiar operation, the nature of which is well known and firmly defined, all events raising a use are identical;<sup>3</sup> and this proposition, which is enough for us to state, we affirm to be not only quite clear upon authority, but to be an obvious and indisputable result of first principles. Hence it evidently follows, that when a shifting use

<sup>1</sup> Sir Wm. Jones properly deprecates this expression. Law of Bailments, 104.

<sup>2</sup> See Mr. Booth's able opinion appended to the Touchstone, Hilliard's Edition.

<sup>3</sup> See Mr. Booth's opinion.

limited to arise on the happening of a given event, would not be affected by the rule against perpetuities, which prevents the suspension of alienation for a longer period than lives in being, and 21 years after, including the time of gestation;<sup>1</sup> neither would an appointment, in pursuance of a power, if bearing exactly the same relation to that rule. To this corollary we are led by reasoning as clear and certain as mathematical demonstration.

Now all our conveyancing readers well know, that the law has given to that highly favoured interest—an estate tail, a certain quality of which, though it seems abstractedly to be an adventitious appendage, that estate cannot be deprived by any proviso in the instrument or contrivance of the parties.<sup>2</sup> That quality is the privilege which the tenant in tail has of levying a fine with proclamations, and of suffering a common recovery.<sup>3</sup> This privilege is instantly and inseparably annexed to his estate. Now it is the invariable effect of a common recovery, when duly suffered by a tenant in tail, to bar and destroy every species of interest ulterior to his estate, whether falling within what may be classed under the generic head of executory interests, or the common law doctrine of remainders and reversions.<sup>4</sup> The consequence is, that the positive rule which was levelled at perpetuities, with a view of preventing the suspension of alienation through the medium of the peculiar doctrines of uses and devises, beyond the period of lives in being, and 21 years after, is always precluded when the executory limitation is preceded by an estate tail.<sup>5</sup>

In marriage settlements of freehold estates this is always the case. The lands are limited to the use of the husband for life, and (after intervenient remainders to the wife and the trustees to support contingent remainders) to the use of the first and other sons in tail. The power of sale is given to the grantees to uses to be executed with the consent sometimes of the then tenants of the freehold, sometimes of those and of the persons next in remainder; and who

<sup>1</sup> See the certificate in *Stephens v. Stephens*, For. 232.

<sup>2</sup> Touch. 40. *Portington's case*, 10 Co. 42 a. 1 Burr. 84.

<sup>3</sup> *Ibid.*

<sup>4</sup> 1 Mod. 108. 2 Lev. 28. 1 Lev. 35. 1 Keb. 73. 2 Salk. 570.

<sup>5</sup> See and consider *Fearne*, 428-9.

may not be *esse* at the time at which the settlement is made. When the power is to be executed with the consent of the person in being, it is evident that under no circumstances can it be objected to on the ground of its tending to a perpetuity ; as the appointment or event by which the shifting use is to arise must be, if at all, within the period allowed for shackling property. But when the power is to be executed with the consent of a person not in existence at the time of its creation, it evidently overleaps that strict but salutary rule, and we must consequently seek for it an extrinsic and collateral support. And as we have already shewn that no future use can be void on account of its remoteness, if preceded by an estate tail, it follows that a power of sale, &c. so circumstanced, cannot be a nullity on that ground, when in its usual place and form, in settlements of freehold estates. Consequently the absence of an express confinement of the power to the permitted period, is immaterial—the insertion of such a restriction nugatory.

The point we have contended for is so clear on principle, and so strong from practice, that we should not have laboured to develope it in this systematic and (to our learned readers) perhaps prolix way, did not a doubt at this moment extensively prevail of the validity of powers for sale, when circumstanced as we have above supposed. That doubt arose from the decision of Lord Eldon in the case of *Ware v. Polhill*.<sup>1</sup> It would be sufficient to say that the point which was established by that case respected leaseholds only, in order to shew that it does not bear upon the question we are discussing. But we shall nevertheless very briefly state the circumstances of *Ware v. Polhill*, and so far as is material to the present point, they are as follow, Freeholds and copyholds were devised to testator's son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainders over ; and leaseholds were bequeathed to trustees to renew and to pay the rents to the persons who, under the above limitations, should for the time being be entitled to the rents of the freeholds and copyholds. And the trustees were empowered at any time hereafter, with the consent of the person

<sup>1</sup> 11 Ves. Jun. 257.

or persons who should as aforesaid be entitled to the rents of the freeholds or copyholds, or, in case such person should be a minor, at the discretion of the trustees, *to sell the leaseholds*. Then followed a declaration (immaterial however to this point<sup>1</sup>) concerning the purchase money, viz. to lay it out in the purchase of freeholds and copyholds to be settled to the uses of the freeholds and copyholds devised. The Lord Chancellor held the power void; for it might travel through minorities for two centuries. "The point (says Mr. Sugden<sup>2</sup>) decided by this case is, that when a leasehold estate is settled as a real estate, but so as to vest absolutely in a *quasi* tenant in tail,<sup>3</sup> a power to defeat his estate by selling the property, and buying a real estate to be resettled, is void." We do not apprehend this to have been the point decided. The Chancellor observed that it "is very difficult to say the *words are so precise, so clearly indicative of the intention* as to authorize the court to say that this is the effect," viz. "whether the trustee did exercise the power or not, whether any tenant for life adult ever gave his consent to the exercise of the power, or withheld it; the person who would take under the first words the absolute interest, as the infant would, *should have that cut down*; the intention being that if this son should die under 21, it should go over in all circumstances."<sup>4</sup> It is, we think, evident from this language of his lordship, that if in the case before him, *precise words clearly indicative of the intention* had been used, and the power had not been void, *for the specific reason above given*, i. e. because it might travel through too long a period, the circumstances of the leasehold estate having been settled as real estate, and having vested in the infant tenant in tail of the latter, would not have prevented the court from holding that his interest "should be cut down." In other respects Mr. Sugden's conclusion appears to us too exactly squared with the case it is drawn from. That acute and able writer has in this instance, as in many others, in-

<sup>1</sup> Vid. *infra*.

<sup>2</sup> Powers, 148, 4th Edition.

<sup>3</sup> In leaseholds *for lives*, (but of course not in leaseholds for years) there *may* be a quasi estate tail, because they may be made descendible to the issue of the devisee. The phrase quasi *limitation* in tail, as applied to chattels, may, however, be convenient, though not unobjectionable.

<sup>4</sup> 11 Ves. 281. We have transposed the two sentences we have cited, to avoid surplusage.

trenched in particularities a position which involves a general and important principle. The circumstance that the proceeds of the execution of the power were to be applied in the purchase "of a real estate to be resettled," was immaterial, as was also, we apprehend, the fact of the person in whom the leasehold estate was to vest absolutely, being "a *quasi* tenant in tail." For the appointment by which the power was to be executed was the event whereby the prior limitation was to cease; and that event, if the power had been good, would have determined the preceding interest by way of executory devise. And as what Mr. Sugden has called a *quasi* tenant in tail takes the entire legal estate under the devise to him exactly in the same manner as if no mention were made of issue, his estate is therefore attended with no peculiar quality, which, with reference to an ulterior limitation, intended to enure by way of executory devise, assimilates it to an actual estate tail in freeholds. It follows that the position may be stated without this qualification of Mr. Sugden's. And with respect to the manner in which the testator directed the trustees to apply the money, nothing is more evident than that if the power was void in the case we are commenting on, by reason of the indefinite period allowed for its execution, an ulterior declaration as to the proceeds of a sale thereunder must have been perfectly immaterial. As therefore Mr. Sugden admits the soundness of the decision in *Ware v. Polhill*, he should have drawn from it a more general and important proposition than that which we have criticised.

Still, however, we coincide with his view of the subject, and think with him that the Lord Chancellor clearly did not mean to impeach the validity of the common power of sale and exchange. It is not to be presumed that the difference between an actual tenant in tail and Mr. Sugden's *quasi* tenant in tail, with reference to the question of perpetuity, could have escaped that able judge; we cannot suppose that he forgot that the *quasi* limitation in tail carried an entirety in the equitable ownership, and was therefore analogous, not to an estate tail in freeholds, but to a fee intended to be determinable by way of executory devise;—an effect extremely material, since when the modifications are of the legal owner-



ship, one reason for the indestructibility of executory interests, of whatever denomination, when they follow the fee, is that the preceding taker has already all he can have; and it would be absurd to allow any common law conveyance by him to extend its operation beyond the limits, which, by an incongruous fiction introduced by the doctrine of uses and devises, comprise the whole estate. And here we may notice a slight inaccuracy in the terms of Mr. Sugden's proposition,<sup>1</sup> to which we are naturally led by these last remarks. For instead of stating that when the leasehold is settled so as to vest absolutely in the *quasi* tenant in tail, the power is void, he should have adopted language expressive of all which undoubtedly he meant,—a legal or equitable *intirety of interest*. For as we have observed, that entirety, whether in freeholds or chattels, is compatible with any mode of defeasance by way of executory devise or future use; and a power of sale in a will is of course one of those modes. But the expression "absolute" is used by the law in its natural and proper sense,<sup>2</sup> and is therefore not synonymous with "whole" or "entire." Then if, as we apprehend, it is absurd to say that an absolute estate can be subject to a defeasance, Mr. Sugden's proposition is evidently one which the logicians call identical.

The point to which we have addressed ourselves is of the greatest practical import; and we hope that the existence of doubts respecting it will be deemed a sufficient reason for this minute scrutiny. Our conclusion we may express in the words of Mr. Sugden,<sup>3</sup> that "general powers of sale and exchange in strict settlement appear to be valid, on the same ground that a shifting use" [or, he might have added, executory devise] "may be limited to take effect at any period, however remote, when the estate is regularly limited in tail, because the tenant in tail may destroy the shifting use" [or executory devise] "by a common recovery." This a *quasi* limitee in tail of a term of years cannot do; and therefore the two cases stand on different grounds with reference to the question, whether an ulterior limitation or power is affected by the rule against perpetuities.

We shall finish with remarking that in our judgment the

<sup>1</sup> Powers, 148.

<sup>2</sup> Co. Litt. 1 b.

<sup>3</sup> Powers, 148-9.

validity of the general power must be rested on this single principle; and this we mention because Mr. Sugden has fortified his conclusion with some collateral observations, which we think irrelevant. "Such a power" (i. e. a general power in settlements of freeholds) "does not, like the power in *Ware v. Polhill*, operate to defeat the estate of the minor tenant in tail, but transfers it from one property to another."<sup>1</sup> Again, he afterwards says, "there is merely a change of title, not a destruction of interest." We do not perceive the author's drift; but one proposition involved in his remarks, viz. that "the general power does not operate to defeat the estate of the minor tenant in tail,"<sup>2</sup> we must take the liberty to comment on. The student should be told that Mr. Sugden never could have meant his words to be taken literally; for nothing is more plainly identified with the fundamentals of powers operating under the doctrine of uses, than that all the estates prior to the power of sale vest subject to be divested or defeated by its execution. A power of revocation is always added, in formally drawn settlements, to the power of sale, from this evident necessity of removing the prior vested uses; and for the same reason the law of itself impliedly involves the former in the latter, whatever form it may assume.<sup>3</sup> Mr. Sugden therefore could have intended only that the general power of sale does not *virtually* defeat the interest of the minor tenant in tail, because, although the appointment thereunder overreaches his identical estate in the lands originally settled, he acquires another estate tail in those which are purchased or taken in exchange.

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ART. VI.—ON THE EFFECT OF THE WILL OF QUASI TENANT IN TAIL OF AN ESTATE PUR AUTRE VIE, UPON THE QUASI ENTAIL AND REMAINDERS OVER.

It may reasonably afford surprise to an inquirer into the history of our laws, that at so recent a period as the latter end of the reign of Charles II., when not only had the prin-

<sup>1</sup> *Powers*, 148.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Bishop of Oxford v. Leighton*, 2 Vern. 367.

eipal divisions of our law of real property been long distinctly marked out, but into many of them the most subtle refinements had been introduced, one important description of interest in real property should have been left to a mode of acquisition which we should expect to find tolerated only amongst men in a savage state. "Where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie*, or him by whose life it was holden: in this case he that first entered on the land might lawfully retain the possession so long as *cestui que vie* lived, by right of occupancy."<sup>1</sup> The Statute of Frauds (in rendering this description of property deviseable like other estates in land, and providing that where not devised, it "should be chargeable in the hands of the heir, if it should come to him by a reason of a special occupancy, as assets by descent; and in case there should no special occupant, it should go to the executors or administrators, and be assets in their hands;"<sup>2</sup>) and the 14 G. 2. c. 20. in rendering it distributable as personalty, greatly improved its character, but left it invested with some very anomalous and perplexing qualities. Partaking in some respects of the nature both of realty and of personalty,<sup>3</sup> it differs in essential particulars from any other description of property coming under either of those classes. Hence has arisen the difficulty which the courts have found in describing the species of the *estate pur autre vie*, and in designating the character in which the several classes of representatives succeed to it. Thus, according to one authority,<sup>4</sup> where an estate *pur autre vie* is granted to a man *and his heirs* during the life of *cestui que vie*, there the heir may enter and hold possession, and is called in law a *special occupant*; though some have thought him so called with no very great propriety, and that such estate is rather a descendible freehold." So Lord Northington held<sup>5</sup> that "this is a descendible freehold," and in *Low v. Barrow*<sup>6</sup> it was laid down by Lord Talbot also that an estate *pur autre vie* "is a descendible freehold only."

<sup>1</sup> 2 Blac. Com. 258.

<sup>2</sup> 29 Car. 2. c. 3. s. 12.

<sup>3</sup> See *Doe d. Blake v. Luxton*, 6 T. R. 292.

<sup>4</sup> 2 Blac. Com. 269.

<sup>5</sup> *Grey v. Mannock*, 2 Eden, 339.

<sup>6</sup> 3 P. W. 262.

On the other hand Lord Kenyon, in *Doe d. Blake v. Buxton*,<sup>1</sup> thus expressed himself upon the subject. “*Estates pur autre vie* certainly are not estates of inheritance: they have been sometimes called, though improperly, descendible freeholds; strictly speaking they are not descendible freeholds, because the heir at law does not take by descent.” It would be irrelevant to our present purpose to notice in detail the many other and more important discrepancies of opinion which have existed in the courts whenever the rights of persons interested in estates *pur autre vie* have called for consideration. This brief notice, however, of the difficulty which has been felt in appropriately describing this species of interest in its simple state, may serve to prepare us for the opposition of opinion which has prevailed amongst eminent modern judges respecting it, when viewed under a modification of not unfrequent occurrence. We allude to the question whether in the case of an estate *pur autre vie* limited to one and the heirs of his body, with remainders over, such *quasi entail* as it is called, and remainders over, are barrable by the will of the *quasi* tenant in tail.

The term “*quasi entail*” applied to this limitation of estates *pur autre vie* would seem to denote a general resemblance to the entail of estates of inheritance, though the courts in using it have at the same time carefully pointed out that in every respect the two estates essentially differ. This solecism in terms is attributable perhaps to times when men were accustomed to designate objects rather by some seeming but unreal resemblance to other objects, than conformably to their intrinsic natures. In *Low v. Burrow*<sup>2</sup> it was laid down “that the limitation of an estate *pur autre vie* to A. and the heirs of his body makes no estate tail in A. for all estates tail are estates of inheritance to which dower is incident, and must be within the statute *de donis*; whereas in this kind of estate, which is no inheritance, there can be no dower, neither is it within the statute.” So in *Grey and Mannock*<sup>3</sup> it was stated to be “not intailable within the statute *de donis*, and therefore no common recovery could be suffered of it.” In the same case of *Low v. Burrow* it was said by Lord Talbot, that

<sup>1</sup> 6 T. R. 291.<sup>2</sup> 3 P. W. 262.<sup>3</sup> 2 Eden, 339. 6 T. R. 291.

although the quasi tenant in tail might by a lease, or lease and release, bar the heirs of his body, yet it seemed to him as if no act which he could do would be capable of barring the limitations over. However, it has long been determined that the person entitled under the limitation in tail may bar the remainders over, as well as his own issue, by deed, surrender, or even articles.<sup>1</sup> The grounds assigned for investing the *quasi* tenant in tail with this power of alienation are, that his estate is "not within the statute *de donis*, nor barrable by recovery;" and that (as it is the mutual interest of landlord and tenant in cases of leases for lives, that such leases should from time to time be renewable, and being renewed, they must by the doctrine of the Court of Chancery continue subject to the same trusts) the estate might otherwise continue for ever without any possibility of being barred.<sup>2</sup> We find it, therefore, distinctly laid down by several authorities, that "the limitation which in the case of an estate of inheritance would create an estate tail, does in the case of a freehold give the party the whole interest, so as to empower him to dispose of it."<sup>3</sup> "Any limitations depending thereupon are entirely in the power of the first taker in tail."<sup>4</sup> "He is entitled to the absolute ownership."<sup>5</sup>

Thus far nothing specifically relating to the effect of the will of a *quasi* tenant in tail appears upon the books. "However in *Doe d. Blake v. Luxton* (before cited), Lord Kenyon, after citing several of the last mentioned cases in support of the proposition that "it is absolutely in the power of the first taker to make what disposition of the estate he pleases," proceeded to state from his MS. note of the case of *Grey v. Mannock*, that Lord Northington seemed to be of opinion that the *quasi* tenant in tail "might have defeated the remainders by his will alone." To this Lord Kenyon observed he had formerly added a *quære*; having "understood that the remainders in such an estate could only be defeated by some

<sup>1</sup> *Grafton v. Hanmer*, 2 P. W. 266. *Norton v. Frecker*, 1 Atk. 524. *Foster v. Foster*, 2 Atk. 259. *Saltern v. Saltern*, 2 Atk. 376. *Williams v. Jekyll*, 2 Ves. 681. *Blake v. Blake*, 3 Cox's P. W. 10. No. 1.

<sup>2</sup> 3 P. W. 266. note E. *Westney's v. Chappel*, 3 Bro. P. C. 51. 2nd edition.  
1 Prest. Abatr. 439.

<sup>3</sup> Per Lord Hardwicke, *Foster v. Foster*.

<sup>4</sup> *Idem*, *Norton v. Frecker*.

<sup>5</sup> Lord Northington. *Grey v. Mannock*.

act *inter vivos*." He added, however, that though he did not desire to be understood as deciding any thing on this point, he was then "inclined to think that the first taker may bar the remainders over by his will alone." In *Campbell v. Sandys*,<sup>1</sup> Lord Redesdale observed upon this dictum of Lord Kenyon, (though as his lordship said it was not necessary for him to decide upon the point) in the following terms. "On principle I think it impossible that a will can have that effect. A will so far as it is a disposition of property is a designation of a special heir against the right of the person to whom the property would otherwise come, by what may be called devolution of law; but *that cannot, from the nature of the instrument, have the effect of depriving of a right a person who does not claim by devolution of law, but by virtue of a preceding gift or instrument.* That must have been the ground on which it was established that the will of a joint tenant cannot sever the jointure. It is an instrument by which the maker is enabled only to bar his heir at law or representative, but which cannot be allowed to alter the rights of third persons." In a later case (*Dillon v. Dillon*\*) Lord Manners ruled that the will of a *quasi* tenant in tail who died *without issue* did not bar the limitations over. "The *quasi* estate tail," said his lordship, "on the death of the *quasi* tenant without issue determined, and by her will she could not dispose of it, for a will can only pass what a party has, and *by her death without issue the estate was spent and there was no interest for the will to operate upon.*"

The cases in which these opinions were expressed by the two learned judges last mentioned, have in a recent publication<sup>2</sup> been cited, in conjunction with a decision<sup>3</sup> upon the effect of *surrender* by an equitable *quasi* tenant-in-tail, as having "incontrovertibly established" the negative of the general question here noticed. If, however, (as we humbly conceive) it is expedient in expositions of the laws to observe some distinction between authorities of this nature, and decisions which go to the whole point in question, these cases are not exactly entitled to the place which is assigned to them in the work referred to. A distinguished writer of the present day

<sup>1</sup> 1 Scho. & Lef. 296.

<sup>2</sup> 1 Ball & Beatty, 77.

<sup>3</sup> 1 Powell on Devises, by Jarman, 41, note (5).    <sup>4</sup> *Blake v. Luxton, Coop.* 1 8

(Mr. Preston<sup>1</sup>) has, when about to cite these same cases, noticed the point in question as yet being among those "propositions which rest on opinion, and not on decision. The effect of a will [of quasi tenant in tail] in particular is doubtful." It may, therefore, yet be open to us to suggest a doubt (with deference to Mr. Jarman) whether "the principle is well stated by Lord Redesdale in *Campbell v. Sandys*,"<sup>2</sup> and whether the reasoning attributed to his Lordship in that case does not go too far for his conclusion.

It will be recollected as a striking peculiarity in the case of an estate *pur autre vie*, that the heir (whether general or special) does not take by descent. If the grant mention "heirs," he who shall happen to hold that character will be entitled to the estate, not in that character, but "as having a special exclusive right by the terms of the original grant, to enter upon and occupy this *hereditas jacens* during the residue of the estate granted."<sup>3</sup> He incurred not at the common law the liabilities of an heir, because he took not as such, or (as Lord Redesdale expresses it) "by devolution of law." Seeing then, that in the case of succession to estates *pur autre vie*, the real difference is in the persons designated to take as special occupants, and not in the character in which they take, that each class in truth is entitled *per formam doni*, and not as taking from the immediate predecessor, this question presents itself:—If it be "impossible" that the will of a quasi tenant in tail can have the effect of barring the right of parties entitled in remainder under the quasi entail and limitations over, because these parties claim "by virtue of a preceding gift or instrument," why should not the same principle operate to save the right of the heir general, whose title is in that respect of precisely the same nature, but who is undoubtedly excluded by the will of the last occupant? The Statute of Frauds makes no distinction between the two classes of special occupants.

Lord Manners's judgment in *Dillon v. Dillon* appears to have mainly rested upon the circumstance of the quasi tenant having died without issue. As his lordship deemed so material the point that there was (as he said) "no interest for the will to operate upon," we may suppose that he had the

<sup>1</sup> 1 Prest. Abstr. 440

<sup>2</sup> Jarman's Powell on Devises, ubi sup.

<sup>3</sup> 2 Blac. Com. 259.

*quasi* estate tail continued to subsist, the result would have been different; since that circumstance would, it is obvious, have appeared wholly immaterial to the question if his lordship had considered the will of the *quasi* tenant to be *in itself nugatory* as against the parties next in succession. It may, perhaps, be inferred from the expressions ascribed to Lord Manners, that his lordship did not exactly hold the opinion which seems to have been adopted by Lord Kenyon: that the whole freehold is vested in the first taker under the limitation of a *quasi* estate tail. Upon this point the notion of the tenant's power of disposition by will apparently rests. With respect to it, the following distinction may, it is conceived, be correctly drawn between the cases of a *quasi* tenant in tail and of a tenant in tail of an estate of inheritance. The former has not (according to the authorities before cited) a limited interest in, or portion only of the freehold, as the latter has of the inheritance, the residue being vested in the persons entitled under the subsequent limitations; but he takes at once by the limitation of the *quasi* entail "the whole interest" in the freehold.<sup>1</sup> This may be proved by the consideration that the conveyance by lease and release of a *quasi* tenant in tail cannot, from its nature, alter the quantity of the estate which passes by it, like a recovery which derives its enlarging effect from principles peculiar to itself. That entire interest then in the freehold which the alienee takes by such conveyance, must previously have been vested in the *quasi* tenant in tail himself. Nor could he have obtained this otherwise than by the original grant. Lord Northington is, indeed, reported to have said,<sup>2</sup> "It is like the case at common law of a conditional fee which became absolute by the party's having issue;" but "the analogy," observes Mr. Preston, in alluding to this notion, "fails, inasmuch as the right of alienation does not in any manner depend on the birth of issue." The remainder-man, therefore, in this case cannot, it should seem, as in the other case (of estates of inheritance) have an interest subsisting together with that of the person taking under the *quasi* entail, but simply a right which accrues to him upon the possession becoming vacant, of taking in succession as special occupant.

<sup>1</sup> Vide references *supra*, p. 292.

<sup>2</sup> *Grey v. Mannock*, 2 Eden, 332.



The *quasi* entail of an estate *pur autre vie* being thus an interest perfectly *sui generis*, it is not by fancied analogies drawn from the rights of persons entitled under other estates, that the present question is to be determined. The safest conclusion to which we can come seems to be, that when circumstances shall call for a decision upon it, the courts will recur to the grounds upon which the *quasi* tenant in tail has been invested with the powers of disposition which he now undoubtedly possesses. Under his right of alienation by deed he has as ample power over the freehold, as a tenant in tail has by recovery, over the inheritance, and any prejudicial consequence which might formerly have been apprehended from the perpetual renewal of estates for lives is now sufficiently guarded against, without extending the power of alienation of the *quasi* tenant in tail to disposition by will.

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#### ART. VII.—ON BEQUESTS TO CHARITIES.

IN looking over the forms of bequests given in the reports of our charitable institutions, and the notes sometimes appended explanatory of the law, it seems to us that sufficient attention has not been bestowed on this very important subject.

We recommend that a statement of the law should always accompany "the form;" for wills are often drawn by practitioners in the country, whose knowledge it may be useful to refresh; and we are not sure that the shortest and simplest form is the best to give, for if it be easy it will be adopted from memory, and the recollection is not unlikely to be erroneous.

We shall now give a short statement of the law.

The purpose of the legislature by the 9 George 2. c. 36. (commonly but very incorrectly called the Mortmain act<sup>1</sup>) was to prevent any estate or interest whatsoever in land or other hereditaments in England or Wales<sup>2</sup> being given or

<sup>1</sup> Per Sir R. P. Arden, M. R. 4 Ves. 427.

<sup>2</sup> Not in Scotland. See the Act, and *Mackintosh v. Townsend*, 16 Ves. 330. Nor in Ireland, *Campbell v. Radnor*, 1 Br. C. C. 271. and *Attorney General v.*

appropriated by will to a charitable institution ; and this purpose has been most anxiously and to the fullest extent executed by the courts.

The following, therefore, cannot be the subject of a devise or bequest to a charitable institution.

1. Land or other hereditaments, whether the tenure be fee-simple, copyhold, or leasehold for life or years. <sup>2</sup>
2. Money charged upon, or to arise by the sale of any such lands or hereditaments. <sup>3</sup>
3. Money directed to be laid out in the purchase of, <sup>4</sup> or to complete the purchase of, or in paying off any mortgage or other incumbrance upon, <sup>5</sup> any such lands or hereditaments.
4. Money directed to be laid out or invested by way of mortgage upon any such lands or hereditaments.
5. Money upon mortgage
  - of lands or hereditaments ; <sup>6</sup>
  - of dock canals or railway shares ;
  - of poor rates, church rates, county rates, or any like assessment. <sup>7</sup>
  - of turnpike tolls (i. e. turnpike bonds) ; <sup>8</sup>
  - of dock, canal, or railway tolls or dues ; <sup>9</sup>

Power, 1 Ball & B. 154. Nor in the colonies, *Attorney General v. Stewart*, 2 Mer. 143. With respect to the exception of Ireland, we may observe, that in 1737, a bill similar to the English Act (9 Geo. II. c. 36.) was brought into the Irish House of Lords, but did not pass. Dean Swift presented a petition to the house, stating that he had long before bequeathed his fortune to charitable uses for the benefit of the kingdom, and prayed that he should be excepted from the proposed enactment. The Dean bequeathed above £10,000. the amount of his savings in the course of about 30 years, to found a lunatic asylum. Sir W. Scott's *Life of Swift*, 439.

He gave the little wealth he had,  
To build a house for fools or mad,  
To show, by one satiric touch,  
No nation wanted it so much.

*Verses on his own Death, by the Dean.*

<sup>2</sup> As to a term of years, see *Attorney General v. Graves*, Amb. 155.

<sup>3</sup> *Arnold v. Chapman*, 1 Ves. sen. 108. *Attorney General v. Lord Weymouth*, Amb. 20. *Currie v. Pye*, 17 Ves. 464. *Waite v. Webb*, 6 Madd. 71.

<sup>4</sup> *Grievess v. Case*, 4 Br. C. C. 67. S. C. 1 Ves. Jun. 548.

<sup>5</sup> *Corbyn v. French*, 4 Ves. 418.

<sup>6</sup> *Attorney General v. Meyrick*, 2 Ves. 45. *White v. Evans*, 4 Ves. 21.

<sup>7</sup> *Finch v. Squire*, 10 Ves. 41. *House v. Chapman*, 4 Ves. 542.

<sup>8</sup> *Knapp v. Williams*, 4 Ves. 430 n.

<sup>9</sup> See *The King v. Winstanley*, 8 Price, 180.

6. Rents or other profits arising out of, or payable in respect of land or hereditaments.

7. Dock, canal, or railway shares.

And it matters not whether the proposed charity be intended for England or some foreign country.<sup>3</sup>

These rules flow naturally from the enactment, that no estate or interest whatsoever in land or other hereditaments shall be given or appropriated by will to a charitable institution. But the courts soon perceived that though a charitable legatee took no interest in land directly, yet he might benefit by the real estate and chattels affecting the realty. Thus, supposing the residue of a personal estate, consisting of mortgages, leaseholds, and mere personal chattels, after payment of debts and legacies were bequeathed to a charity, it is clear that the mortgages and leaseholds could not pass under this devise; but then the question arose, whether they might be first applied in payment of the debts and legacies, so as to leave as ample a residue for the charity as possible. And it is obvious the same kind of question might occur, though a legacy only were given to the charity.

It is curious to trace the decisions of the courts on this subject; by no means consistent, till they arrive at the rule which is now established.

Lord Hardwicke was the first judge before whom the point arose. As to legacies he appears to have argued thus:—Before the statute 9 Geo. 2. if legacies were given, and debts charged on real and personal estate, the rule was, if the personal estate were not sufficient to discharge both debts and legacies, the debts were ordered to be paid out of the real estate. Creditors having two funds to resort to, shall not unnecessarily disappoint legatees who have only one.<sup>4</sup> The benefit of this rule his lordship declared he was willing to extend to charitable legacies, notwithstanding the act; and he decreed accordingly.<sup>5</sup>

But this does not apply to a residue. “There is no rule that where real and personal estate is charged, and the residue

<sup>3</sup> *Curtis v. Hutton*, 14 Ves. 537.

<sup>4</sup> 1 Ves. Sen. 110. *Amb.* 158. 217. 2 *Eden*, 211.

<sup>5</sup> *Attorney General v. Lord Weymouth*, *Amb.* 25. A. D. 1745. S. C. cited by Lord Hardwicke himself, 1 *Cox*, 12.

ven to a legatee or children, the court would in such case turn the charge on the real, to give the whole personal estate to the legatee."<sup>1</sup> Hence Lord Hardwicke decided, that where the produce of real estate and personal estate was bequeathed, after payment of debts and legacies, to a charity, that though the charity could not take the produce of real estate, yet that the personal estate should be first applied in payment of the charges, and the residue only of it go to the charity.\*

If, however, in such a case, the produce of real estate was not included in the fund bequeathed, but it consisted of chattels real and personal, the same learned judge, in analogy to the rule of marshalling assets, decreed that the chattels real should in favour of the charity be first applied in payment of the debts and legacies.\*

But in a case<sup>4</sup> in which there was a specific bequest of leaseholds, which was void because given to a charity, and fell into the residue, which residue, subject to debts and legacies, was given to a charity, Lord Chancellor Northington, who was "bent by his judgment against all chicanery to avoid the statute," decreed contrary to "this confused idea of marshalling." He held not only that the leaseholds should not be first applied in discharging the debts and legacies, but that they should not bear a proportion of the charges in average.

A. D. 1741, Mr. Baron Smythe, sitting for the Chancellor, held that in case of a devise of real and personal estate, after payment of debts, to a charity, that the debts could not be thrown upon the real estate in favour of the charity.<sup>5</sup> This accords with the judgment of Lord Hardwicke in *Arnold v. Chapman*.

<sup>1</sup> 1 Ves. Sen. 110.

<sup>2</sup> *Arnold v. Chapman*, 1 Ves. Sen. 108. A. D. 1748. *Mogg v. Hodges*, 2 Ves. Sen. 9. A. D. 1750. S. C. 1 Cox, 52. Note however in this case the direction, that the debts and legacies were to be paid out of the personal estate.

<sup>3</sup> *Attorney General v. Tomkins*, Amb. 216. A. D. 1754. See 2 Ves. Sen. 187. and *Attorney General v. Caldwell*, Amb. 635. A. D. 1766, in which case Sir Thomas Sewall, M. R. followed the decision of Lord Hardwicke.

<sup>4</sup> *Attorney General v. Tyndall*, 2 Eden, 207. A. D. 1764.

<sup>5</sup> *Foster v. Blagden*, Amb. 704.

A testator devised a descendible freehold lease to be sold, and gave the produce and all his personal estate to trustees to pay debts and legacies: he bequeathed several legacies to charities. In 1761 Sir Thomas Clarke, M. R. in accordance with the decisions of Lord Hardwicke, decreed that the assets should be marshalled in favour of the charitable legacies, for the personal estate was not sufficient to pay the debts and all the legacies. But his honour's decree was reversed by Lord Chancellor Apsley, who declared that the assets should not be marshalled.<sup>1</sup>

A residue, including leaseholds, was given to the Society for the Propagation of the Gospel. It was contended on behalf of the society that the produce of the leaseholds should be first applied in payment of the debts and legacies; but if that could not be, then that such produce should bear an equal proportion with the testator's personal assets. It was however ordered, agreeably with Lord Northington's decision, that the personal assets should be applied in payment of the debts and legacies, and that the leaseholds should go to the next of kin.<sup>2</sup>

Testatrix devised her real estate to trustees for a term of 1000 years, with remainders over in strict settlement.<sup>3</sup> She declared the trusts of terms to pay several annuities mentioned in her will; and, after giving, among several other pecuniary legacies, four charitable legacies of £100, £200, £100, and £400, she gave the residue of her undisposed personal estate to her executors, in trust to apply the same and the produce thereof as far as the same should extend, in payment of debts, funeral expences and legacies; but as she thought that such residue would not be sufficient for those purposes, she willed that the trustees should raise such deficiency by mortgage of the lands, &c. comprised in the said term, or by the rents and profits thereof.

The master's report stated the amount of the testator's personal estate, which consisted of mere personal chattels; and the amount of debts and legacies. The cause was overheard by Lord Chancellor Bathurst. The following is an extract from the

<sup>1</sup> *Hillyard v. Taylor*, Amb. 1713. Reg. Lib. 1772. A. fo. 335.

<sup>2</sup> *Middleton v. Spicer*, Reg. Lib. 1774. B. fo. 88. S. C. 1 Br. C. C. 201.

<sup>3</sup> *Field v. Martyn*. The statement of the case is taken from the registrar's book. Lib. Reg. 1777. A. 590. S. C. 2 Dick. 543.

decree :—“ It appearing the personal estate of the testatrix, *after payment of her debts*, is not sufficient to pay the whole of the legacies given for the charitable purposes mentioned in the will ; his lordship declared such charity legacies are entitled to a proportionable part of such personal estate with the other legacies ; and it is further ordered, that the master do settle the proportion such charity legacies and the other legacies ought to abate ; and it is further ordered, that what shall be allotted as the proportion of such personal estate be paid accordingly ; and it appearing that the personal estate will not be sufficient to pay the debts and legacies, his lordship declared such deficiency, except in respect of the charity legacies, ought to be raised out of the estates comprised in the term of 1000 years.

So Lord Chancellor Thurlow held that a mortgage included in a residue should not even contribute to the debts and legacies in favour of a charity, the residuary legatee.<sup>1</sup>

Again, in a case<sup>2</sup> in which the only question was whether the court would marshal or make any arrangement of assets, Sir Lloyd Kenyon, M. R. said he considered it to have been the established law of the court from Lord Northampton's time, not to marshal or arrange assets in favour of a charity. And his honour declared that charitable legacies were entitled only to be paid out of the personal estate *pari passu* with the other legacies.

But the system of contribution which was urged, without success, on behalf of the Gospel Propagation Society in *Middlesex v. Spicer*, was established as a rule by Sir R. P. Arden, M. R. in the *Attorney General v. the Earl of Winchelsea*. The decree in that case, in which there was a general bequest of all the residue of testator's personal estate to a charity, was, that the debts, legacies, and costs, should be paid out of the chattels real and personal *pro rata*.

Yet in a later case, in which charitable legacies were given, and real estate was subject to the payment of the debts and legacies, the Lords Commissioners Ashhurst and Wilson held

<sup>1</sup> *Attorney-General v. Martin*, cited 3 Br. C. C. 377.

<sup>2</sup> *Ridges v. Morrison*, 1 Cox, 180. April 1785. See *Foy v. Foy*, 1 Cox, 163.

<sup>3</sup> 3 Br. C. C. 373. A. D. 1791. S. C. nom. *Attorney General v. Hurst*, 2 Cox, 364. Reg. Lib. 1790. A. fo. 554 and 1791, A. fo. 487.

that the assets could not be marshalled, and decreed that the charitable legacies should be paid with the other legacies out of the personal assets only.<sup>1</sup> Now these assets, after payment of the debts, afforded a sum to be divided among the legatees, which was greatly deficient, so that the charities lost considerably: of course the deficiency in the legacies not charitable would be supplied by the produce of the real estate.

A testator enumerated several chattels, real and personal, and gave them, subject to the payment of his debts and legacies, to a charity.<sup>2</sup> He evidently considered such enumeration to comprise all his personal estate not before specifically bequeathed; in fact, he thought he made a residuary bequest. But having sold an estate after the making of his will, the purchase money became a residue undisposed of. Lord Chancellor Loughborough declared that the residue undisposed of should be first applied towards payment of the debts, legacies, and costs; and that the residue of such charges should, according to the principle of the case the Attorney General v. Earl of Winchelsea, be raised by a *pro rata* contribution of the chattels savouring of the realty and of the mere personal chattels; that the residue of the former should go as undisposed of to the next of kin, and the residue of the latter to the charity.

Lord Chancellor Eldon, too, and Sir W. Grant, decided that if the residue of personal estate (composed of the produce of real estate, chattels savouring of the realty, and mere personal chattels,) after payment of debts and legacies, be given to a charity, the charges shall be apportioned between the funds of which the personal estate is composed.<sup>3</sup>

<sup>1</sup> Makeham v. Hooper, Reg. Lib. 1792, B. fo. 145. S. C. 4 Br. C. C. 153.

<sup>2</sup> Howse v. Chapman, 4 Ves. 642. A. D. 1799. Note in this case, among the enumerated articles given to the charity, was a navigation share, which appears to have been real estate, and went to the heir; but the decree (page 551) does not appear to have made this navigation share bear its *pro rata* proportion of the debt and legacies. This, however, was probably an oversight, for see page 547; and Curtis v. Hutton, 14 Ves. 537.

<sup>3</sup> Paice v. The Archbishop of Canterbury, 14 Ves. 364. A. D. 1807; and Curtis v. Hutton, Ibid. 537. A. D. 1808. Reg. Lib. 1807, A. fo. 1273. By the decree in Curtis v. Hutton, Reg. Lib. fo. 1276, the testator's real and leasehold estates were ordered to be sold; and his Honour declared, that the testator's debts and legacies, except the legacy of £200. and the interest thereon, and the annuities and arrears thereof, ought to be paid and answered out of the monies to arise from the

If, then, a residuary bequest be made to a charity, and the testator's personal estate consists in part of money, or chattels, arising from or savouring of the realty, it may now, upon the authority of the cases before Lord Alvanley, Lord Loughborough, Lord Eldon, and Sir W. Grant, be considered as settled that the debts and legacies must be paid by a *pro ratâ* contribution of such chattels and the other part of the personal estate.

With respect to charitable legacies, it does not appear that there is any modern case which decides that the same rule applies to them; but there can be little doubt but that such would be the conclusion of the court. Lord Hardwicke's doctrine that assets should be marshalled in favour of charitable legatees is no longer law; but there seems no reason why the benefit of a contribution, as in the case of a residue, should be denied to them.<sup>1</sup>

It cannot be doubted, though the object of the statute 9 Geo. II. is more entirely attained by refusing to marshal assets in favour of a charity, that the intention of the testator is thereby defeated. He does not distinguish between money upon mortgage or secured by a turnpike bond, and money in the funds; when he makes his will and bequeaths all his personal estate, he does not contemplate that the law will make another disposition of it, and give it to persons whom perhaps he never saw nor heard of. But then the policy of the law is to be preferred to the whimsies of testators; and dying men are to be protected from artifice and fraud, or from the suggestions of a superstitious conscience. The best policy is to ensure a man an absolute dominion over his own possessions; this is the corner stone of national wealth and greatness. Some limitation there may be to this grand maxim; but it would be difficult to approve the principle

leasehold estates, and from the real estates, and the other personal estate, in the proportions which these estates bore to each other in value; and it was ordered, that the said master should settle such proportions, and ascertain what parts of each of the said estates, according to such proportions, ought to be set apart to answer the annuities; and after declaring to whom the residue of the money arising from the real and leasehold estates would belong, his honour declared that the clear residue of the other personal estates would belong to the college of Aberdeen.

<sup>1</sup> See the case of *Howae v. Chapman*, 4 Ves. 542. in which the bequest to the charity was in fact a specific legacy, and not a general residue.



which denies that monies, however secured, or however arising, should be given to charitable purposes. Surely individuals, frequently the distant and unknown relatives of the testator, have no just right to complain if they share not in his bounty : and the commonwealth is no loser, if instead of such persons being enriched, the ignorant are instructed, the unfortunate and diseased are succoured, or some other object of public utility is promoted.

If, indeed, a testator leave other property sufficient to pay his debts, the law allows him to bequeath by will the whole of his personal chattels to charity, free from all charges ; but he must express his intention in clear terms. We shall gladly show how a testator may secure to a charitable object the full measure of his bounty ; first, however, explaining, by an example or two, in what manner the rule of contribution established by the courts operates in practice.

Suppose, and it is not an uncommon case, that a testator, after directing his debts to be paid and giving pecuniary legacies, bequeaths the residue of his personal estate to a charity. Suppose the whole personal estate to amount to 5000*l.* and this sum to consist of 2000*l.* upon mortgage, and the remainder to be money in the funds, bond debts, promissory notes, &c. If the debts were 500*l.* and the pecuniary legacies 2500*l.* it might be said that the charity would be entitled to the residue of 5000*l.* viz. 2000*l.* ; but no. A court of equity says, the gift to the charity, so far as affects the mortgage debt, is *void*, and we will not apply this sum in payment of the debts and legacies and give the residue to the charity, for by so doing the charity, though indirectly, would derive a benefit from the mortgage, which is an interest in *land* ; in other words a court will not marshal assets in favour of a charity. Thus in the case put, the mortgage debt (2000*l.*) would only contribute *pro ratâ* to the debts and legacies, and the amount would be ascertained by the following proportion : —

Amount of personal estate.	Debts and legacies.	Mortgage.	
As 5000	: 3000	: : 2000	: 1200, portion of debts and legacies to be borne by the mortgage debt.

The remainder, therefore of debts and legacies (3000 —

1200 = 1800) 1800*l.* must be paid out of the other part of the personal estate, viz. 3000*l.* which will leave (3000—1800=1200) 1200*l.* only; and this sum (1200*l.*) would be all that the charity would be entitled to; for it would lose the remainder of the mortgage-debt (800*l.*) which would be considered as a void bequest, and *pro tanto* the testator would die intestate.

This is not an imaginary case; the Society for promoting Christian Knowledge in 1804 lost a sum secured by a mortgage of poor rates and county rates for building a gaol in a similar manner;<sup>1</sup> and yet no form of a bequest has been given by that or any other society to prevent the recurrence of such a loss.

But if instead of the residue a legacy only is given, the rule to which we have referred may still operate injuriously to a charity. Taking the same date as above, suppose that the testator's debts and legacies amounted to 1000*l.*, and that he gave a specific legacy of 2500*l.* to the charity, and bequeathed the residue to an individual; the court would direct the 1000*l.* for debts and legacies to be paid by the mortgage debt, and the rest of personal estate *pro rata*. Thus,

Amount of personal estate.	Debts and legacies.	Mortgage debt.	
As 5000	: 1000	: 2000	: 400, portion of mortgage debt to be applied in payment of debts and legacies.

Hence there would remain 600*l.* of debts and legacies to be paid out of 3000*l.* personal estate not on mortgage; and 2400*l.* only of this sum would remain to satisfy the legacy to the charity, which would consequently get 100*l.* less than the testator intended.

And if it were held, according to the case of *Makeham v. Hooper* cited before, that there should not be a contribution in favour of charitable legacies, but that only the residue of the testator's mere personal assets, after payment of all his debts, should be divisible among the charitable and other legatees, it would be of more importance that the forms we are about to propose should be adopted.

<sup>1</sup> *Finch v. Squire*, 10 Ves. 41.

The following forms are proposed to meet the circumstances of the case.

*Form of Bequest of a LEGACY to a Charitable Institution.*

"I give the sum of           *l.* sterling to the Society [state the title], and I direct that the same be paid before and in preference to my debts and other legacies out of such part of my personal estate as I can by this my Will lawfully bequeath to charitable uses ; but so nevertheless if it be necessary that such other legacies should abate, then that the legacy given to the said Society shall abate in like proportion : and I also direct that the receipt of the treasurer [or treasurers] of the said Societies shall be a sufficient discharge for the said legacy."

*Form of a Bequest of a RESIDUE.*

"I give the residue of my personal estate unto the Society [state the title], and I direct that such part of my [personal<sup>1</sup>] estate as I cannot by this my Will lawfully bequeath to charitable uses, and as is applicable by law or by this my Will to the payment of my debts and legacies, shall be the primary fund for payment of the same : and I also direct that the receipt of the treasurer [or treasurers] of the said Society shall be a sufficient discharge for the said residue."

In conclusion we may observe, that a person may in his lifetime, by an indenture executed 12 calendar months before his death, and enrolled as the act (9 Geo. II.) directs, make any gift or settlement in favour of a charitable institution of land or other hereditaments, or of money secured upon mortgage, or of any kind of real or personal property whatsoever : but the deed must operate as an *immediate* and *absolute* gift, no estate or interest being reserved to the donor, and the requisitions of the act in all other respects being strictly observed.

And money, too, may be given, even by will, for the pur-

<sup>1</sup> If the testator intends that his debts and legacies shall in favour of the charity be paid out of real estate, or the produce of real estate, this word 'personal' should be omitted.

pose of improving land, or for building houses, or for sustaining and repairing houses already built upon land in mortmain, or vested in trustees for charitable uses.<sup>1</sup>

The following observation respecting the enrolment of the deed conveying lands to a charity we extract from a paper in the Appendix of the Report of the National Society for education of the poor ; which paper was written by a very eminent lawyer.

“ A deed of bargain and sale is the most convenient form for conveying a fee-simple, and if this shall be acknowledged by the grantor, for the purpose of enrolment, the record, or an official copy, will be evidence of the deed itself without proving the execution by the witnesses, or proving their handwriting, if the witnesses should be dead when such proof should be wanted ; but if the grantor cannot conveniently acknowledge the deed, it may be enrolled on an acknowledgment by any of the other parties, or an affidavit of the due execution of the deed. Yet the acknowledgment of the grantor is preferable, for the reasons before stated.”

There is a clause in the act 9 Geo. II. c. 36. that the provision relating to the execution of the deed, twelve calendar months before the death of the grantor, shall not extend to any purchase of any estate or interest in lands made really and *bonâ fide* for a full and valuable consideration. The marginal note attached to this clause states its effect to be, that the limitations in the act do not extend to purchases. This is, of course, going beyond the words of the legislature, which do not exempt a purchase deed from enrolment. However, many purchases have been made by trustees for charitable purposes, especially for the meeting-houses of dissenters, and the conveyances being considered as within the exception were not enrolled, and of course void. To cure this defect, which rendered much property in the hands of charitable trustees unsaleable, an act was passed in the last session (9 Geo. 4. c. 95.), whereby it is enacted,

Sect. I. “ That where any lands, tenements, or hereditaments, or any estate or interest therein, have or has been pur-

<sup>1</sup> 4 Ves. 428. 8 Ves. 186.

chased for a full and valuable consideration, in trust or for the benefit of any charitable uses whatsoever, and such full and valuable consideration has been actually paid for the same, every deed or other assurance already made for the purpose of conveying or assuring such lands, tenements, or hereditaments, estate or interest as aforesaid, in trust or for the benefit of such charitable uses, (if made to that effect in possession, for the charitable use intended, immediately from the making thereof, and without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever for the benefit of the grantor, or of any person or persons claiming under him,) shall be as good and valid, and of the same effect, both for establishing derivative titles, and in all other respects, as if the several formalities by the said act prescribed had been duly observed and performed."

Sect. II. "Provided always, and be it further enacted, That nothing in this act contained shall extend to give effect to any deed or other assurance heretofore made, &c. or to effect or prejudice any suit at law or in equity actually commenced for avoiding any such deed, &c."

Sect. III. "Provided also, and be it further enacted, That nothing herein contained shall be construed to dispense with any of the said several formalities prescribed by the said recited act, in relation to any deed or other assurance which shall be made after the passing of this present act."

Though the act of Geo. II. prevents lands being devised to a charity, yet trustees to whom money is bequeathed may the next day purchase land therewith, and hold it by law upon the very trusts declared by the testator! Thus may that object at least of the said act be most effectually defeated, which was in imitation of Magna Charta "and divers other wholesome laws," to restrain alienations of lands in mortmain "as prejudicial to and against the common utility." This did not escape Lord Hardwicke; he observed, "the act meant to leave persons to dispose personal estate for a perpetual charity; but meant to prevent the great mischief of giving land for that, or money to be laid out in land, as that would lock up land from being used in a commercial way,

which would be a detriment to the public. The clause of the purchases in the statute I very well know, was put in relative to Queen Anne's bounty; and whether that may want a remedy hereafter, may be a question."<sup>1</sup>

But if land be devised or money bequeathed to persons absolutely, though nothing appears on the will to point to or shew a trust, yet if there is evidence that such persons engaged to hold or dispose of the land for charity, or to lay out the money in the purchase of land for a like purpose, so as to raise the presumption that the testator was thereby induced to make such devise or bequest, a court of equity will compel the persons taking such gift to answer on oath whether there was any trust. And if a trust appear, it considers them merely as trustees for the representatives of the testator. Though there be in such a case no declaration of trust to satisfy the Statute of Frauds, equity raises a trust on the ground of the fraud on the policy of the law.\*

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ART. VIII.—ABSTRACT OF AUTHORITIES RELATING TO THE WELLESLEY CASE.

*Observations upon the Power exercised by the Court of Chancery of depriving a Father of the Custody of his Children.* London, J. Miller. 1828.

*Observations on the Natural Right of a Father to the Custody of his Children, and to direct their Education; his Forfeiture of this Right; and the Jurisdiction of the Court of Chancery to controul it.* By James Ram, Esq. of the Inner Temple, Barrister at Law. London, A. Maxwell. 1828.

THE origin of this jurisdiction has given rise to much dispute; Mr. Hargrave, in a note to Coke Littleton, as-

<sup>1</sup> 2 Ves. Sen. 189.

<sup>2</sup> *Edwards v. Pike*, 1 Eden, 267. *Boson v. Statham*, ibid. 508. *Muckleston v. Brown*, 6 Ves. 52. *Strickland v. Aldridge*, 9 Ves. 616. *Paine v. Hall*, 18 Ves. 475.

serting it to have been founded on recent usurpation: Mr. Fonblanque, in his Treatise on Equity, contending, in opposition to Mr. Hargrave, that it is derived from the king as *parens patriæ*. So also, in one of the works prefixed to this article and attributed to Mr. Beames, its very existence is denied; while the object of the other is to show that a father may forfeit his right to the care of his children, and that, in such an event, the court of chancery has jurisdiction to remove them out of his custody.

It is not our intention to discuss the relative merits of the arguments on either side, but briefly to set forth, by reference to decided cases, the existing state of the law upon this interesting question.

In the *Duke of Beaufort v. Bertie*, Lord Macclesfield observed, that guardians appointed by will according to the statute<sup>1</sup> had no more power than guardians in socage, and are but trustees, on whose misbehaviour, or giving occasion for suspicion, the court would interfere. And in *Eyre v. Countess of Shaftesbury*,<sup>2</sup> according to Lord Commissioner Jekyll, "the court may, upon petition only, make an order to determine the right of guardianship, in regard the care of all infants is lodged in the king as *parens patriæ*, and by the king this case is delegated to the court of chancery."

*De Manneville v. De Manneville*<sup>4</sup> was a petition, an application for a habeas corpus to the king's bench having failed, to prevent a father, an alien friend, from removing his daughter, a natural born subject, from this country. Lord Eldon: "The court of king's bench, when the child was brought up by habeas corpus, declined to interfere; and I am not surprised at it, for the court has not within it by its constitution any of that species of delegated authority that exists in the king as *parens patriæ*, and resides in this court as representing his majesty."

Then, referring to a decision of Lord Thurlow,<sup>3</sup> "the law imposed a duty upon parents; and in general gives them a

<sup>1</sup> 1 P. Wil. 703.

<sup>2</sup> 12 Car. 2. c. 24.

<sup>3</sup> 2 P. Will. 116.

<sup>4</sup> 10 Ves. 52.

<sup>5</sup> *Creuze v. Hunter*.

credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred in which a father was unable or unwilling to execute that duty, and further, was actually proceeding against it, of necessity the state must place somewhere a superintending power over those who cannot take care of themselves, and have not the benefit of that care which is presumed to be generally effectual." Order as prayed. In *Creuze v. Hunter*,<sup>1</sup> the defendant being in embarrassed circumstances, and residing abroad, was restrained from removing his child from the custody of its mother, who supported it upon property left to her separate use by her father. Lord Thurlow observing, that "the court had arms long enough to reach such a case, and prevent a parent from injuring the health or future prospects of the child; and that whenever a case was brought before him, he would act upon this opinion."

In *Skinner v. Warner*,<sup>2</sup> a father was restrained from interfering with his children on the ground that he was a bankrupt, having no settled place of abode, and was in the habit of using great cruelty to his wife. And in *Courtois v. Vincent*,<sup>3</sup> a guardian was appointed to the natural children of the testator, the mother being alive, and not consenting.

*Whitfield v. Hales*<sup>4</sup> was a petition for a reference to the master to appoint a guardian and allowance for maintenance. The father was in possession of the estate. It was supported by affidavits of gross ill treatment and cruelty towards the infants by their father, on which account a prosecution had been instituted, under which he was imprisoned. Notice of this application had been given, and no one appearing to oppose it, the order was made.

In *Shelley v. Westbrook*,<sup>5</sup> the petition of the infant plaintiffs stated, that three years previously, their father deserted his wife, and had since cohabited with another woman; that thereupon their mother returned to her father's house with her children, who had since been maintained by their

<sup>1</sup> 2 Cox, 242. 1 Jac. 260. note.

<sup>2</sup> 2 Dick. 779. 4 Bro. C. C. 101.

<sup>3</sup> 1 Jac. 268. note.

<sup>4</sup> 12 Ves. 492.

<sup>5</sup> 1 Jac. 266. note.



mother and her father, and that their mother had lately died. It was then stated that the father avowed himself an atheist, and had published a work deriding the truth of the Christian revelation, and denying the existence of a God as Creator of the universe;<sup>1</sup> and that since his wife's death, he had demanded possession of the infants, in order to educate them as he thought proper. Their maternal grandfather had lately transferred 2000*l.* 4 per cents. to trustees for them at twenty-one or marriage with his consent, and in the meantime to apply the dividends for their maintenance and education. Lord Eldon, in his written judgment, observes, "This is a case in which, as the matter appears to me, the father's principles cannot be misunderstood, in which his conduct, which I cannot but consider as highly immoral, has been established in proof, and established as the effect of those principles: conduct, nevertheless, which he represents to himself and others, not as conduct to be considered immoral, but to be recommended and observed in practice, and as worthy of approbation. I consider this, therefore, as a case in which [the father has demonstrated that he must and does deem it to be matter of duty which his principles impose on him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct

<sup>1</sup> "There is no God! This negation must be understood solely to affect a creative deity. The hypothesis of a pervading spirit, co-eternal with the universe, remains unshaken." *Queen Mab*, a Philosophical Poem, by Percy Bysshe Shelley; note 7. This is the work alluded to by Lord Eldon. In another note it is said, "Chastity is a monkish and evangelical superstition, a greater foe to natural temperance even than unintellectual sensuality; it strikes at the root of all domestic happiness, and consigns more than half the human race to misery, that some few may monopolize according to law. A system could not well have been devised more hostile to human happiness than marriage." Another notorious avowal of this gentleman's opinions was the annexing *Αθεος* to his name in a public signature-book on the Continent (we believe at Mont Blanc). His warmest admirers, even Lord Byron, have admitted this to be *bad taste*. As Talleyrand said of the Duc d'Enghien's execution, *C'est plus qu'un crime, c'est une faute*. A traveller, who followed Mr. Shelley, added *Μωρος* to his adopted title. At what age Mr. Shelley recanted, we cannot say; but it has been confidently asserted, that before his death he "confessed, with tears in his eyes, that he had been all along in the wrong." These facts, not given in the report, are stated as an illustration of the case, and enable our readers to estimate the justice of Lord Eldon's conclusion.—*Edit.*

in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community. I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively to what is called the care to which Mr. Shelley wishes it to be entrusted.”

It is unnecessary to set forth the facts of the recent case of *Wellesley v. Beaufort*,<sup>1</sup> which is now chiefly interesting as having elicited from Lord Eldon a most luminous and forcible exposition of the law on the subject before us. “It has not been doubted at the bar,” says his Lordship, “that this jurisdiction belongs to the court and to the individual who sits in it. It is right that the bar should so treat the subject, because (whether it be fit or not that such jurisdiction should be suffered to remain) I take it to have been long settled by judicial practice, that such is the law of this country; and, when it has been so settled, counsel do not act according to a right view of their duty, if they seek to disturb that settled course of practice. That settled course forms the law of the land; and the judge is bound to follow that law so settled, and to see that it is put into execution.” Then, referring to a dictum of Lord Hardwicke, “that there must be a suit depending relative to the infant or his estate,”<sup>2</sup> and to an observation at the bar that the court had not exercised this jurisdiction, unless where there was property of the infant’s to be taken care of, he observes; “If any one will turn his mind attentively to the subject, he must see that this court has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction; because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically, only

<sup>1</sup> 2 Russ. 1.

<sup>2</sup> Ambler, 303. *Butler v. Freeman*.

where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infants." He afterwards proceeds; "The important consideration is,—is it necessary that the court should thus interfere? If this court has not the power to interpose, what is the provision of law that is made for the children? You may go to the court of King's Bench for a *habeas corpus* to restore the child to its father; but when you have restored the child to the father, can you go to the court of King's Bench to compel that father to subscribe even to the amount of five shillings a year for the maintenance of that child? A magistrate may compel a trifling allowance, but I do not believe that there ever was a mandamus from the court of King's Bench upon such a subject. Wherever the power of the law rests with respect to the protection of children, it is clear that it ought to exist somewhere: if it be not in this court, where does it exist? Is it an eligible thing that children of all ranks should be placed in this situation — that they shall be in the custody of the father; although, looking at the quantum of allowance which the law can compel the father to provide for them, they may be regarded as in a state little better than that of starvation? The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father. Those duties have been acknowledged in this his Majesty's court for centuries past." Having commented at great length on the evidence before him, he thus concludes: "As the result of the whole case, I must now say, I have no difficulty whatever. In addition to all that belongs to the nature of the connection with Mrs. Bligh—to that course of adultery between her and Mr. Wellesley, which has been carried on through all this length of time under the most disgraceful circumstances, there has been, in my judgment, most grossly improper conduct on the part of Mr. Wellesley towards his children. When I look at the whole conduct of Mr. Wellesley towards Mrs. Bligh, towards his children, and with reference to other points, which shew the tenor and bent of his mind upon certain subjects, and the nature of his sentiments, I say, that if the House of

Lords think proper to restore these children to Mr. Wellesley, let them do so ; it shall not be done by my act.”<sup>1</sup>

There is another class of cases, relating to the instance of a legacy to an infant by a stranger, and appointment of a guardian, in the lifetime of the father.

In *Ex parte Hopkins*,<sup>2</sup> an uncle, during his life, maintained in his own house three nieces ; and by his will left them large fortunes to be paid to them at twenty-one or marriage, with the consent of his executors, one of whom lived in the house where the testator died, and where the infants continued to reside. The father having presented a petition, praying that his children might be delivered over to him, Lord King dismissed the petition on the ground that a bill was necessary ; but observed, “ The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature ; and it cannot be conceived, that because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian. The father having thus a right to the guardianship of his own children, if he can any way gain them, he is at liberty so to do, provided no breach of the peace be made in such an attempt.”

In *Powell v. Cleaver*,<sup>3</sup> Lord Thurlow observed, “ It is nowhere laid down that the guardianship of a child can be wantonly disposed of by a third person : the wisdom would be, not to raise points on such a question, as the court will take care that the child shall be properly educated for his expectations.”

In *Potts v. Norton*,<sup>4</sup> the testator left legacies to the infant children of his brother, and an annuity to the brother himself, on condition that he would commit the education of his children to the testator’s executors. Upon an ap-

<sup>1</sup> This decision has since been affirmed, on appeal, by the House of Lords. Both Lord Redesdale and Lord Manners considered the Chancellor’s jurisdiction unimpeachable. *Wellesley v. Wellesley and others*, 1 Dow, 152. See also *Kiffin v. Kiffin*, cited in *Duke of Beaufort v. Besty*, 1 P. Will. 705. *Teynham v. Lennard*, 4 Bro. P. C. 302. ed. Toml. *Mountstuart v. Mountstuart*, 6 Ves. 363. *Faguani v. Selwyn*, 1 Jac. 268. note. *Lord Westmeath’s case*, 1 Jac. 251. note.

<sup>2</sup> 3 P. Will. 162.

<sup>3</sup> 2 Bro. C. C. 500.

<sup>4</sup> 2 P. Will. 110. note.

plication for maintenance, an enquiry was ordered, whether the father was willing to commit the education of his children to the executors. The master reported that the brother had appeared before him and *consented*, and this report was confirmed. The brother having afterwards removed the children from school, the executors, by their petition, prayed that he might be ordered to replace them. The Master of the Rolls refused to enquire into the right of the court to remove a child from the custody of a parent, while the master's report of the parent's consent remained in force; and ordered the children to be replaced.

*Lyons v. Blenkin*<sup>1</sup> was the case of a gift by a woman of a moiety of certain estates to her three grand-daughters as tenants in common; and also of other estates and pecuniary legacies to each of them. She entrusted the management of the whole property during the minority of the infants to her daughter, their aunt, whom she appointed their guardian. The children resided with the testatrix at her death, and with her daughter for three years subsequently, when the father filed a bill, insisting that his daughters ought to be placed under his care, and that not being of ability to maintain them, a proper sum should be allowed to him for that purpose. Lord Eldon: "Nobody can doubt that if I give a provision to your child, it does not give me or any one else a right to controul your care of her; not at all; but, on the other hand, if when she is young I was to give her a considerable maintenance during her infancy, which you could not have supplied, and a large fortune after, and you, the father, permit her to take advantage of that education, which could not have been afforded but through my gift, could you afterwards stop short and say that she should no longer have that advantage? Under such circumstances, the court would enquire what was most for her benefit. It is always a delicate thing for the court to interfere against the parental authority; yet we know that the court will do it, in cases where the parent is capriciously interfering in what is clearly for their (the infants') benefit. It has been stated that the father is a dissenting minister: I mention that again, guard-

<sup>1</sup> 1 Jac. 245.

ing myself against it being supposed that his being that character furnishes the least ground why he should not have the care of his children ; but it furnishes this observation ; that his situation in life leaves him without the means of so educating them as they ought to be educated, regard being had to their fortune and estate.... But the circumstance that decides me about not removing the children is this, that although the testator could not impose the terms of appointing a guardian where the father was living : yet the father by his consent might enable the guardian to act, and by his consent, it appears, that he has enabled the guardian to act.... It therefore does appear to me that the testatrix, by the benefits she has given these children out of her property, has purchased the power of educating them in the way, and under the controul and guardianship, which she has pointed out, and the parent has consented to."

In *Wilcox v. Darker*,<sup>1</sup> the infant was entitled to 5000*l.*; his father was in a low situation, and insolvent. The petition of the infant represented his father as indebted to him in a sum which he was unable to pay, and an order was made *by consent* for the father to authorize another person to receive the dividends of the infant's fortune ; and also *by consent* for the master to approve of a proper person to have the care of him, and to enquire whether he had contracted any debts for necessaries. The last case to which we shall refer is that of *Colston v. Morris*,<sup>2</sup> where a testator gave 10,000*l.* to trustees upon certain trusts for the infant plaintiff, the direction of whose education he committed to his trustees ; and a legacy to the father, on condition of his never interfering in the education of his daughter. The Vice Chancellor decreed, that on the father's undertaking to abandon all interference with the trustees in respect to his daughter's education, he would be entitled to the benefits given him by the will. The father afterwards entered into a recognizance not to interfere.

From these numerous decisions it appears, that the court will remove a child from the guardianship of his parent on the ground of unfitness, from want either of ability or dis-

<sup>1</sup> Dick. 631. 1 Jac. 250. note.

<sup>2</sup> 6 Mad. 89. 1 Jac. 257. n.

position, for the charge naturally and legally reposed in him, provided there is a fund sufficient for the maintenance of the infant within the power of the court; for although one or two cases appear to be exceptions to this rule,<sup>1</sup> it is reasonable to suppose that in them the infants were not without the means of support. It appears also, that no person can, without a father's consent, defeat his right of guardianship, the court always taking care that the child's education be according to its fortune; but that where such consent has been accorded by a father, the court will not suffer him to retract it. That the jurisdiction itself is now legitimately exercised by the Chancellor is equally evident, if the same test, namely, the authority of concurring decisions, be applied to this as to other questions of law; and without adverting to the policy of such a jurisdiction, the consideration of which may form the subject of a future article, we would observe that, if its existence is to be tolerated, the court of Chancery seems to be the only tribunal to which, in the present state of our courts, it can be conveniently entrusted.

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ART. IX.—ON THE SALE AND WARRANTY OF HORSES.

LAWSUITS, it has been justly remarked, originate less frequently in the positive dishonesty and bad faith of the litigants, than in their gross misconception of each other's rights and liabilities. We would fain hope that this remark is not altogether inapplicable to the mass of litigation arising out of the sale of horses. Not that we implicitly believe in the scrupulous integrity of the tribe whose principal occupation and means of livelihood this transaction constitutes. Let us not be thought to accuse the jockey over-hastily of any morbid sensibility to the requisitions of honour, morality, or law.

<sup>1</sup> Anonymous case alluded to by Lord Eldon in *De Mannerville v. Mannerville*, and again in the *Wellesley* case.

It is, proverbially, no part of his vocation. But, be the fact what it may with respect to the professional dealer in horses, an occasional purchaser would often, we conceive, by a very slight acquaintance with the first principles of the law of sales and warranties, be not only delivered from much anxiety in negotiating this *awfully* delicate bargain, but he would also, in many instances, escape the misery of being driven to contend for his rights in the dreaded arena of a court of justice. It is to such persons that we here address ourselves, if not exclusively, yet primarily and principally; and we purpose to lay before them a general outline of the nature of a warranty, as a casual accessory or incident in the sale of horses, together with the rights and liabilities therefrom arising. Our observations on the warranty shall be preceded by a cursory survey of the general contract of sale itself, in the course of which we shall select for our more particular notice, out of the multitude of rules by which the contract is more or less directly governed, a few that are marked by some degree either of difficulty or peculiarity in their application to our subject matter, and a few others of primary importance though not similarly distinguished; being compelled to a selection of some sort, by the obvious impossibility of even alluding, in the compass of a few pages, to a hundredth part of the incidents which ought to be treated of in a regular dissertation on this subject. In the execution of this task, we promise to divest our language as much as possible of technicality, — to expose ourselves rather to be taxed by the professional reader with introducing matter too familiar, than checked by the unprofessional for omitting what to him might be useful information; and, although we cannot presume to expect like that leviathan of the law, Lord Coke, that we shall succeed in avoiding “all obscurity, ambiguity, jeopardy, novelty and prolixity,” yet will we, at least, study to be as clear, concise and elementary as we may.

A sale, then, is defined by Blackstone to be “a transmutation of property from one man to another, in consideration of some price or recompense in value. But the terms of this definition, as the celebrated commentator immediately subjoins, are evidently too comprehensive, as they embrace the



case of an exchange as well. *A transmutation of property for a pecuniary consideration* seems, therefore, to be the proper definition of a sale. It is a transmutation of the right of *property* in goods, let it be remarked, as contradistinguished from the mere right of *possession*.

To the moral stringency of this or any other contract, nothing more is necessary than the mutual consent of the contracting parties, seriously and deliberately given, to its formation: but to enable society to enforce the obligations resulting from such an engagement, some satisfactory marks are obviously requisite, of this consent having existed in a serious and deliberate form. These probative marks or tokens are by lawyers termed indifferently ceremonies, formalities, or solemnities. In the earlier stages of society they are necessarily rude. Shaking hands and striking money across the hand (whence our phrase of striking a bargain) are among the commonest of them.<sup>1</sup>

But the progress of civilization and commerce soon demands the substitution of less equivocal evidence. With us formerly, a simple agreement *by word of mouth* for the sale of personal chattels was in most cases sufficient; and in some few instances it remains so still. But by the Statute of Frauds, which is stated to be made "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury," it is enacted, "that no contract for the sale of any goods, wares or merchandizes for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

<sup>1</sup> With the Jews — "Now this was the manner in former time in Israel concerning redeeming and exchanging, for to confirm all things; a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel. Therefore the kinsman said unto Boaz, Buy it for thee. So he drew off his shoe." Ruth, c. 4. v. 7, 8.

"Among savage nations, the want of letters is imperfectly supplied by the use of visible signs which awaken attention, and perpetuate the remembrance of any public or private transaction. The jurisprudence of the first Romans exhibited the scenes of a pantomime." Decline and Fall, ch. 44.

We proceed to make a few observations upon each of the alternative solemnities required by this statute to the perfection of the contract of sale; requesting the reader to bear in mind that we are discussing the contract with a peculiar reference to the subject matter of this article. Our attention is, in the first place, directed to the delivery and acceptance of the goods sold, in cases where no written memorandum exists, or earnest or part payment is made or given. If nothing has yet been done in the way of acceptance or delivery, either party may obviously, in the cases to which this statute extends, refuse to complete the contract.

Thus if A. and B. should enter into a verbal agreement for the sale of a horse for more than ten pounds, to be delivered at a future time, and the earnest should not be paid, or the horse delivered, or any note or memorandum in writing signed, such a contract would be within the statute, and consequently void. But it is here necessary to observe that a manual transfer or *actual* delivery and acceptance, is not in every case essential; for the law will often, from certain acts, *imply* a delivery to satisfy the statute. A *constructive* delivery does, indeed, sometimes itself, without any distinct substantive act of the buyer, arise out of the very terms of the contract, independent of the bargain; as in a case where the plaintiff, who kept a livery stable and dealt in horses was in treaty with the defendant for the sale of two horses, and demanded a certain price for them; the defendant offered a less sum which was refused; but at length he sent word that "the horses were his, but that, as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff, upon this, removed them out of his sale stable into another stable, and it was held that there was here a sufficient delivery to satisfy the statute.<sup>1</sup> And the key to this and similar cases seems to be that the vendor by the terms of the bargain is converted into an agent for the vendee, and thus occupies the double character of principal during the sale, and servant upon its completion. It is also sufficient evidence of a delivery, if the purchaser, with the privity and approbation of the vendor, exercises any act of ownership over the goods, though their local situation remains unchanged: as by selling

<sup>1</sup> Elmore v. Stone, 1 Taunt. 458.

again to a third person ;<sup>1</sup> marking the article with his name or initials,<sup>2</sup> &c. Thus where the seller was ready to deliver the horse, and waited only for the convenience of the buyer, who, in the meantime, went to the stable where the horse was standing, took him out, and showed him to a person, who, as he thought, might purchase, and to whom he offered to transfer him on receiving 5*l.* upon his bargain ; these were held to be circumstances from which a jury might infer a delivery and acceptance within the statute.<sup>3</sup> It may also be prudent to observe that the principal need not act personally herein, delivery to a servant or agent in the course of his employment being in general equivalent to a delivery to the employer himself.

Our books do not fully correspond as to the precise signification of the term *earnest* ; but it would seem that giving a piece of money as earnest, however low its value, is sufficient to bind the bargain. The money must, however, be altogether parted with, for in a question on the purchase of a horse, it was held that the purchaser's drawing across the seller's hand a piece of money which he afterwards returned into his own pocket (the ceremony above alluded to) was neither an earnest nor part-payment to take the case out of the statute.<sup>4</sup>

We shall not dwell long upon the solemnity mentioned last in that section of the Statute of Frauds which we have recited ; but it may be useful to observe that, although the names of *both* parties must appear on the face of the memorandum, or, at least, in some *writing* capable of being connected therewith by a sound legal inference ; yet the signature of the party sought to be charged, or of his agent, is sufficient.<sup>5</sup> And this term *signature*, be it also observed, is not here used in the limited sense of *subscription*, so as to require the party to write his name *at the end* of the instrument, but is equally applicable in whatever part the name is written. Whether sales by public auction are within the Statute of Frauds, has long been a disputed point ; the better opinion is in favour of their being so ; and it, therefore, becomes ne-

<sup>1</sup> Chaplin v. Rogers, 1 East, 192.

<sup>2</sup> Hodgson v. Le Bret, 1 Campb. 233.

<sup>3</sup> Blenkinsop v. Carter, 1 B. Moore, 328.

<sup>4</sup> Blenkinsop v. Clayton, 7 Taunt. 597.

<sup>5</sup> Allen v. Bennet, 3 Taunt. 169. Schneider v. Norris, 2 M. & S. 286.

cessary to mention here that the auctioneer is, in such sales, the *agent* of *both* parties.<sup>1</sup>

Upon the regular completion of the sale, the property in the article is transferred to, and absolutely vested in the vendee, though no actual change of *possession* may have taken place; and the purchaser thenceforward stands by all risks, and is the sole sufferer from any injury which may happen to the animal, otherwise than through the negligence of the vendor. As in the example given by Blackstone, "If A. sells a horse to B. for 10*l.*, and B. pays him earnest or signs a note in writing of the bargain, and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract, the property was in the vendee."

But although the right of *property* is thus absolutely transferred by the contract, yet unless payment be expressly postponed to a future day, the buyer will not be entitled to *possession*, without tendering the stipulated price.

Nothing can, at first sight, appear more anomalous than that a right of property should ever be transferred by sale, without the vendor himself having any right of property in the goods; but abstract principles of justice (as we shall by and by have occasion to insist upon more fully) require to be often postponed to the pressing exigencies of commerce and the general convenience of society. It is expedient, says Blackstone, that the buyer by taking proper precautions, may, at all events, be secure of his purchase; and hence, it is a general rule of law in regard to personal chattels, that "all sales and contracts of any thing vendible, in fairs or markets overt, shall not only be good between the parties, but also be binding on all those that have any right or property therein."<sup>2</sup> This rule, however, has many exceptions, a few only of which our limits will permit us to adduce; but it will not be amiss first of all, to state shortly what market overt is considered to be. It is in open market, held either in London or in the country. In London, every day (except Sunday) is market day, and every shop in which goods are

<sup>1</sup> See *Simon v. Metivier*, 1 Bl. Rep. 599. *Hinde v. Whitehouse*, 7 East, 558.

<sup>2</sup> 2 Black. 448.

<sup>3</sup> 2 Bl. 449.

exposed to sale, a market overt for those things in which the shopkeeper is in the habit of dealing. In the country, special days only, provided for particular towns by charter or prescription, are market days; and the market place, or spot of ground set apart by custom for the sale of particular goods, the only market overt.<sup>1</sup> The same may be said of fairs, for every fair is a market.<sup>2</sup>

The first example we have to notice as to the conclusiveness of sales in market overt, is introduced by the statute 21 H. 8. c. 11. which enacts that where goods are feloniously stolen, a sale in market overt shall not bind the owner, if he prosecute the felon to conviction or outlawry. But the most important qualification of this general rule of the conclusiveness of such sales, is peculiar to the case of horses, for a purchaser gains no property in a stolen horse sold in market overt, unless the requisitions of the statutes 2 P. & M. c. 7. and 31 Eliz. c. 12. are attended to. By the former of these it is enacted, "that the sale in any fair or market overt of any stolen horse, shall not alter the property therein, unless the horse shall in the time of such fair or market be openly ridden, led, walked, driven or kept standing by the space of one hour together, at the least, betwixt ten of the clock of the morning and the sunsetting, in the open place of the fair or market wherein horses are commonly used to be sold; and unless all the parties to the contract, present in the said fair or market, shall also come together and bring the horse to the open place appointed for the toll-taker (or for the book-keeper where no toll is due) and there enter, or cause to be entered, their names, surnames, and dwelling-places, with the colour and one special mark, at the least, of the same horse, in the toll-taker's book, (or in the keeper's book for that purpose, where no toll is due) and also pay him their toll if they ought to pay any; and if not, then the buyer to give one penny for the entry." And by the latter, the sale shall not be valid, "unless the toll-keeper, &c. shall take upon him perfect knowledge of the person so selling, and enter all the same his knowledge into a book there kept for sale of horses; or else, that he so selling shall bring to the toll-taker, &c. one suffi-

<sup>1</sup> 2 Bl. 449.<sup>2</sup> 2 Inst. 406.

cient and credible person to testify that he knoweth the party selling and his true name, surname, mystery and dwelling-place, and there enter the name in the said book; and also enter the price of the horse so sold; and give the buyer a note in writing of the full contents of the entry. And if the owner, within six months after the horse is stolen, put in his claim before some magistrate of the place where the horse shall be found; and within forty days more prove his property by the oath of two witnesses, and tender to the person in possession such price as he *bonâ fide* paid for him in market overt; he shall, notwithstanding a full compliance with the requisitions of these statutes, have his horse again. We have simply to remark upon these statutes, that if the seller of a stolen horse, in market overt, be entered in the toll-book, by a *false* name, the property does not appear to be altered.<sup>1</sup>

We now come to the important doctrine of warranty, which is thus summed up by Lord Coke. "By the civil law every person is bound to warrant the thing that he sells or conveys, although there be no express warranty; but the common law binds him not, unless there be a warranty, either in deed or in law, for *caveat emptor*."

In this *caveat emptor*, as in the *et ceteras* of Littleton, a volume of wisdom is doubtlessly contained, and we shall, therefore, with all humility and reverence, endeavour to translate a page or two of it, as well for the edification of our plain and uninstructed readers, as to clear the way for an intelligible exposition of the doctrine of warranties,—a subject that has been much perplexed by the ignorance of text writers of the simple principles which actually govern it. The meaning, then, of this oracular expression is, that the buyer takes the article sold with all its defects, and must not look to the law for any redress, if its intrinsic worth do not correspond with its outward appearance. It cautions the buyer, therefore, according to the Italian proverb, "That he has need of a hundred eyes, but the seller, of only one." Now a rule of so much harshness could hardly prevail, if the principles of natural equity were alone to be consulted. For

<sup>1</sup> Gibb's case, Owen 27. and Cro. Eliz. 86.

when a defective article is unwittingly purchased at a sound price, these principles seem to require that a bargain so unequal should be corrected by the seller's refunding a proportionate part of the purchase money. You permit him, otherwise, to obtain an undue advantage in a contract intended to be framed on the basis of equality. "*Nemo debet locupletari alienâ jactura,*" is the undoubted rule of natural justice. It is no valid argument that the defect, latent it may be, existed when the commodity was bought by him who is now the seller. To put a familiar instance,—who would dream of passing off a light sovereign because he had received it as of the standard weight? The civil law, therefore, which would compel the vendor, without any express warranty, to indemnify the vendee for latent defects existing at the time of the sale, seems more consonant with equity than our own. But there are many natural duties that it would be hazardous for courts of justice to attempt to enforce; and experience proves that a strict adherence here to the abstract principles of justice, although the rights of individuals might thereby be occasionally supported, would be prejudicial to the community at large, by its tendency to promote vexatious litigation, and to fetter the freedom of commercial intercourse. Accordingly in this country, the doctrine of implied warranties, *as taught by the civil law*, is, with a solitary exception possibly, rejected *in toto*. In its bearing upon the law of horses, it received its death-blow in the time of Lord Mansfield, before when, it was a current opinion that a sound price given for a horse was tantamount to a warranty of soundness: but though this great judge was so distinguished for adjudicating according to equity, yet when this doctrine came to be sifted by him, it was found "to be so loose and unsatisfactory a ground of decision, that he rejected it altogether."

By the law of England warranties are divided into express and implied; but implied warranties have been too frequently, and as we think, very illogically, considered by our text-writers to include that class of cases in which mere fraud is the ground of action—an error which has sprung from the formal division of the civil law being retained, while its substance was rejected. For as by a general rule, the civil law

gave an action *whenever* the commodity sold was defective, it necessarily implied a warranty in the specific case where the seller happened to know of the defect, and had used some artifice to conceal it; but this *fraudulent act* was not, and never could be, the *foundation* or *condition* of the warranty, which was universally an essential part of the contract itself, and would equally have existed without any such knowledge or malpractice. Warranties are *contracts*, and may be vitiated but can never be created by *tort*. *Implied warranties*, then, properly so called, differ in no respect from *express*, except in the circumstance, of *proof*. The intention to warrant is collected in the former, from the whole tissue of circumstances proved, and as a legitimate deduction from them, like the presumption of any other fact not established by direct evidence; while in the latter, that intention is proved by direct and express testimony to the fact itself. To give a single instance. In *Jones v. Bowden*<sup>1</sup> it was proved to be the uniform course and habit of dealing in a particular trade, if the article were sea-damaged, to state that fact on the sale of it; a sale was made without any such statement, and it was, therefore, held that the article was warranted not sea-damaged. This was an implied warranty.

A warranty can only exist as a term and condition of the contract of sale, into the very essence of which it so completely enters that a breach of it entitles the buyer to treat, if he pleases, the whole contract as a nullity. It constitutes part of the inducement or consideration for the purchase. It follows that for a warranty to be valid, it must exist or be made *at the time* of the sale; or at least, that being agreed to be made before, there should be an understood reference at the actual sale to that agreement. As, for instance, if, previous to the time of the sale, the vendor says he *will* warrant the goods, and having named his price, gives the vendee two or three days to consider of it, and the vendee then agrees to purchase; the warranty, though only made hypothetically, is tacitly incorporated into the terms of the sale, and is a valid warranty.

<sup>1</sup> 4 Taunt. 847.



But a warranty made after the completion of the sale is of no value whatever, being without any consideration.<sup>1</sup>

From these premises also, coupled with the rule that where a contract is reduced into writing, the writing is the sole legitimate evidence to prove its terms, we may further deduce that an oral warranty made previously to a sale by written contract, but not inserted in the instrument, will not be valid. Thus in *Pickering v. Dowson*,<sup>2</sup> Gibbs, C. J. says, "I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, *that* shortens and corrects the representations; and whatever terms are not contained in the contract, do not bind the seller, and must be struck out of the case."

It is also a rule of law that where a commission is given to execute any work, every power necessary to carry it on will be implied. A servant, therefore, employed to sell a horse, has an implied authority to warrant that it is sound;<sup>3</sup> and, in the case of a *general* agent, e. g. the servant of a livery-stable keeper, — this warranty will bind the master, though made *contrary* to his express directions;<sup>4</sup> and, in every case, the warranty of a servant or agent so entrusted to sell, will bind the principal, if he do not expressly prohibit it being made.<sup>5</sup>

With respect to what declarations of the seller will amount to a warranty, the primary rule for the interpretation of contracts in general, is applicable. It depends upon the intention of the parties.

Thus a simple affirmation of the goodness of the commodity is a warranty, provided it appear to have been so intended; whereas the sublimest epithets that seller ever employed to recommend his goods to a credulous buyer, will be regarded as the idle phraseology of the market, unless an intention to warrant actually appear. For example, when the vendor declared at the time of the sale, that he *could* warrant, it was

<sup>1</sup> *Chandelor v. Lopus*, Cro. Jac. 4. In 2 Chitt. Plead. the form of a count on a warranty, made subsequently to the purchase, is given. He cites 1 Vin. Abr. 578.

<sup>2</sup> 4 Taunt. 779.

<sup>3</sup> *Alexander v. Gibson*, 2 Campb. 555.

<sup>4</sup> Vide 3 T. R. 760.

<sup>5</sup> See 3 T. R. 761. 2 Camp. 555. and see 5 Esp. R. 71.

held to mean that he *would* and *did* warrant.<sup>1</sup> So where the seller affirms that the goods are his property, he is held to warrant the title.<sup>2</sup> And, on the other hand, where at the time of the sale, the seller showed the buyer a written pedigree, which he had received from the person of whom he bought the horse, and said that he sold him *according to* that pedigree, knowing nothing of him further than he learned therefrom, the mark being out of his mouth when he bought him, and the pedigree was proved to be false; it was held that this was no warranty.<sup>3</sup> No general rule, therefore, can be laid down on the present head, further than this—that it is from the intention of the parties, as collected from the whole transaction, and from the meaning they appear to afford to particular expressions, that the existence or non-existence of a warranty is to be inferred.

But the most important branch of our investigation relates to the *extent* of the warranty. We must here observe, in the first place, that although a warranty may be made to extend to temper, freedom from blemish, age, aptitude for particular work, and many other similar qualities, as well as to soundness; yet unless expressly so extended, it will be construed to apply to soundness alone. Thus, where an ambiguity arose from the insulated position of the word “warranted,” in the following notice—“To be sold, a black gelding, five years old, has been constantly driven in the plough — warranted,” — the warranty was held to apply to soundness alone.<sup>4</sup>

Now unsoundness is a term of which the exact limits are not very clearly defined. Its signification is not restricted to irremovable organic defects or incurable maladies, but has often been extended to disorders which are slight and temporary. And, indeed, according to Lord Ellenborough, any infirmity which renders a horse less fit for present use and convenience is an unsoundness.<sup>5</sup>

The chief difficulty, however, which lies in the way of ascertaining whether any given defect be an unsoundness or not, proceeds from a cause which no legal skill and learning can remove — namely, the imperfection of veterinary science.

<sup>1</sup> *Bukton v. Corder*, 7 Taunt. 405.

<sup>2</sup> *Medina v. Stoughton*, 1 Salk. 210.

<sup>3</sup> *Dunlop v. Waugh*, Peake, N. P. C. 123.

<sup>4</sup> *Richardson v. Brown*, 8 Moore, 338. S. C. 1 Bing. 344.

<sup>5</sup> *Elton v. Jordan*, 1 Stark. 127.

Who shall presume to decide whether *thrushes*, *splints*, or *quidding*, materially affect the value of the animal, when the learned professors of farriery are themselves disagreed thereon? With respect to these and many other disorders, and also with respect to the degree of permanency or radicalness that maladies are required to have, in order to constitute unsoundness, there are many and conflicting authorities; and our only way, therefore, of treating this part of our subject, is to lay before our readers a few cases, illustrative of the points in dispute, so as to enable them to form some conclusion for themselves upon the matter.

The doctrine that any infirmity which renders a horse less fit for present use and convenience is an unsoundness, was laid down by Lord Ellenborough, in a case which turned upon an alleged lameness, and wherein it was admitted by a witness for the defendant that one of the fore-legs had been bandaged, because it was weaker than the other; upon this admission, the verdict in favour of the plaintiff seems to have been founded; and it was then observed by the court, "To constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service; as, for instance, a cough which for the present renders it less useful, and may ultimately prove fatal."<sup>1</sup> Now this decision appears to contradict a prior one, in which Eyre C. J. held, that a slight lameness occasioned by the horse having taken up a nail at the farrier's was not an unsoundness. This learned judge, in his observations to the jury, remarks, "A horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse within the meaning of the warranty."<sup>2</sup> If these decisions are not to be regarded as conflicting, our deduction ought possibly to be, that such slight injuries as proceed from external causes, and are with moral certainty to be speedily and effectually cured, do not fall under the head of infirmities; which term properly comprehends such diseases only as may without much improbability hang by the animal through life, while they impair his present usefulness. Though it need not be observed, that objectionable or even vicious tricks and habits,

<sup>1</sup> *Elton v. Jordan*, 1 Stark. 127.

<sup>2</sup> *Garment v. Barrs*, 2 Esp. 673.

such as starting and shying, unconnected with the general health or muscular power of the animal, do not constitute an unsoundness ; yet there are several bad habits which demand a few remarks, inasmuch as by some farriers they are supposed to be symptomatic of disease, and by others not ; and upon which, experienced professional men differ according to the degree in which they exist. Thus crib-biting is said to be a habit that leads to indigestion, by occasioning a pernicious waste of saliva, without which the digestive process cannot be carried on. In its origin it is merely accidental, arising from bad training, and not from any inherent defect in the animal, and in its first stages it is therefore easily curable. Accordingly, while in this incipient state, it has been held to be no unsoundness ; but when it has become inveterate, emaciation and gradual decay of strength appear to be its necessary consequence, and it then falls within the meaning of the term. So, as to roaring, it was held by Lord Ellenborough to be insufficient to show that the horse was a roarer, inasmuch as roaring might be a bad habit merely ; but that to establish a breach of warranty, it must be shewn to be symptomatic of disease.<sup>1</sup> In a subsequent case, however, it being proved by an experienced veterinary surgeon that roaring is occasioned by a *constriction* of the neck of the windpipe, which renders it too narrow for accelerated respiration, and that the disorder was of such a nature as greatly to incommode a horse when pressed to his speed, the same judge held it to be an unsoundness.<sup>2</sup>

It is commonly asserted that a warranty will not bind when it is obviously false ; the instance given being that of a horse warranted sound, when it is apparent that he is blind ; and for this doctrine, the venerable argument, which makes so conspicuous a figure in legal logic, is usually urged—for that it is his own folly. For that it is the other's roguery,

<sup>1</sup> Basset v. Collins, 2 Camp. 523.

<sup>2</sup> A nerved horse is unsound. Per Best, C. J. 1 Ry. & Mood. 290. A cough unless proved to be of a temporary nature, is an unsoundness. Shillitoe v. Claridge, 2 Chitt. 425. and see Chitt. 416. See also, as to particular warranties, Geddes v. Pennington, 5 Dow. 164. Coltherd v. Pancheon, 2 D. & R. 10. Atterbury v. Fairmanner, 8 Moore, 32. Joliff v. Bendell, 1 R. & M. 136. Symonds v. Carr, 1 Camp. 361. which our limits prevent us from stating at large.

might, we think, be an argument of greater cogency the other way, unless knaves in this country are to be regarded with peculiar favour, like idiots in Turkey; but we apprehend that this rule—if an such indeed exist—is one of presumption only, it being inferred that both parties ment to exclude the particular defect from the warranty. The case of *Skillitoe v. Claridge*,<sup>1</sup> however, goes far towards disproving the existence of such a rule.

Let us now consider how the rights of the parties are affected by the horse being unsound at the time of the warranty. The contract being thus broken on the part of the seller, it is at the buyer's option either to treat it as a nullity, and release the horse, or to retain him notwithstanding, and bring an action on the warranty. In the former case, the price paid is the measure of damages which he will be entitled to recover in an action; in the latter, the difference between that price and his real value.<sup>2</sup> If he offer to rescind the contract, and return the horse, he may also recover the expences of his keep; but, in order to this, a positive tender is said to be necessary. No notice of unsoundness need be given to the vendor, to entitle the vendee to maintain the action; nor is it necessary to bring the action immediately on discovering the unsoundness. As in a case where a mare was warranted to be sound, quiet, and free from vice and blemish, the buyer, soon after the sale, discovered that she was a roarer, had a thorough-pin through the hook, and also a swelled hock from kicking; yet kept her after this for three months, gave her physic, and used other means to cure her. At the end of that time he sold her; but she was soon returned to him as unsound. He subsequently sent her back to the seller as unsound, who refused to receive her, and in returning to the stables she died. He recovered the full price.

But although such notice be not essential, yet is it always advisable to be given; as the omitting to do so will furnish, at the trial, a strong presumption that the horse at the time of the sale was free from the defect complained of; thus ren-

<sup>1</sup> 2 Chitty R. 425.

<sup>2</sup> *Caswell v. Coare*, 1 Taunt. 566. S. C. 2 Camp. 82. "If the plaintiff buy the horse it is his own, and he must keep his own horse as long as he has it."—Per Lawrence J.

dering the proof of a breach of warranty more difficult. Common justice and honesty, it has been remarked, require that the commodity should be returned at the earliest period, and before it has been so changed by lapse of time as to make it impossible to ascertain, by proper tests, what were its original qualities.

To entitle the buyer to the benefit of the warranty, he must, of course, strictly fulfil the conditions stipulated to be performed on his part. Thus, if as is frequently the case, a condition be introduced into the warranty, that the horse, if objected to as unsound, shall be returned within a limited time, no action can be maintained for the unsoundness without strict performance of this condition. So where the warranty was qualified by an undertaking on the part of the vendor to take back the horse, *if on trial* he should be found to have any of the defects mentioned in the warranty, it was held, that the buyer must return the horse immediately upon the discovery of them.<sup>1</sup> When the contract is rescinded by the buyer, on account of the warranty being broken, the seller has a right to require that the horse shall be returned in as good a condition as he was in when the defect was discovered; and, therefore, if the animal fall into a worse state subsequently to such discovery, the buyer cannot then return him, but must rely on his action to recover back a proportional part of the price.<sup>2</sup>

There being no warranty, but the purchaser having been imposed upon, and entrapped into a losing bargain by the artifices or wilful misrepresentations of the seller, his remedy is an action for the deceit; to support which, he must prove a fraud to have been committed by the seller, and also that it was such as might well impose upon a person of ordinary circumspection; or, in other words, that he was deceived and misled by relying on the integrity of the seller, in a point where he might reasonably have placed trust and confidence in him.

Any wilful misrepresentation by the vendor of the qualities of the commodity to be sold, whereby the vendee is induced to purchase, falls within the legal idea of fraud, and will vitiate the contract, as being a breach of that good faith which ought to reign throughout every commercial transaction. This may be called fraud in words. Thus, if A. knowing his horse

<sup>1</sup> Adam v. Richards, 2 H. B. 573.

<sup>2</sup> Curtis v. Harmay, 3 Esp. Rep. 82.

to be broken-winded or lame, induce B. to purchase, by an assurance that he is sound in wind and limb; then, although A. may have expressly refused to warrant, B. will nevertheless be entitled to recover from A. in an action for the deceit. It is obvious, however, that this action could not be here maintained upon mere proof of the abstract falseness of the representation made by the seller; but that evidence of the moral falsehood is requisite—the seller's knowledge, that is, of the falsity, called in technical language the *scienter*. And herein it is, principally, that this action is distinguished from actions on breach of warranty; for the warranty extends to all faults known and unknown to the seller. The other kind of fraud may be termed fraud in deed; and we shall conclude this article by producing an instance which may serve to exemplify the nature of those acts of the seller which would fall under this head. "I remember," says Gibbs C. J. "the case of a sale of a house in South Audley Square, where the seller being conscious of a defect in the main wall, plaistered it up, and papered it over; and it was held that as the vendor had expressly concealed it, the purchaser might recover."<sup>1</sup> To extend this principle to our subject-matter,—it is conceived that if the vendor were to deceive the purchaser either as to colour, which may easily be done by chemical means, or as to age, by (to use a west-country phrase) *bishopping* the animal, i. e. filing the teeth,<sup>2</sup> he would be liable for the deceit, although no verbal representations had been made.

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#### ART. X.—HAWKERS AND PEDLARS.

ONE advantage of a work like this is its fitness for discussing such stray topics of inquiry as are not deemed important enough for separate publication. For this reason, and because the privileges and liabilities of itinerant dealers have more than once been brought into question of late,<sup>3</sup> we give a summary of the law relating to them.

<sup>1</sup> *Pickering v. Dowson*, 4 Taunt. 785.

<sup>2</sup> In Somersetshire it is common to say that a horse, thus treated, *has been to Wells*. These expressions well merit the attention of etymologists.

<sup>3</sup> Particularly in a case which occurred at Oxford a few months since.

A hawker is defined by Dr. Johnson, to be "one who sells his wares by proclaiming them in the street;"—a pedlar, (petty dealer) "one who travels the country with small commodities."

Various statutes have passed for licensing and regulating them, viz. 9 & 10 Wm. 3. c. 27. 3 & 4 Ann. c. 4. 9 Geo. 2. c. 35. 7 Geo. 3. c. 43. 29 Geo. 3. c. 26. 50 Geo. 3. c. 41. and 52 Geo. 3. c. 108.

All licences are now granted under 50 Geo. 3. c. 41. and continue in force until the 1st of August next, following from the dates of such licences.<sup>1</sup> They are annual licences.<sup>2</sup> Before they are granted, it is necessary that the person applying for a licence should produce to the commissioners appointed for granting licences, a certificate of good character, signed by the clergyman and two respectable inhabitants of the parish in which the applicant usually resides.<sup>3</sup>

The remarks on these statutes may be collected under the following heads:—

I. The description of persons liable to the duty on hawkers' licences.

II. The penalties on hawkers, &c. trading contrary to the provisions of the act.

III. The exception of certain cases specified in sections 5 & 23 of 50 Geo. 3. c. 41. and in 52 Geo. 3. c. 108.

IV. The proceedings for the purpose of enforcing the provisions of the act.

I. The description of the persons from whom the duty is payable, is contained in the 6th section, subject to the exceptions contained in sections 5 & 23, and 52 Geo. 3. c. 108.

The 6th section enacts, that from and after the 1st day of August 1810, there shall be raised and paid the rates and duties following; that is to say, by every hawker, pedlar, petty chapman, and every other trading person and persons going from town to town, or to other men's houses, and travelling either on foot or with horse, horses or otherwise, in England and Wales, or the town of Berwick-upon-Tweed,

<sup>1</sup> S. 3.

<sup>2</sup> S. 9.

<sup>3</sup> 12.



carrying to sale or exposing to sale any goods, wares or merchandize, a duty of 4*l.* for each year. And every person so travelling with a horse, ass, or mule, or other beast bearing or drawing burthen, the sum of 4*l.* yearly for each beast he or she shall so travel with over and above the said first mentioned duty of 4*l.*

*Every hawker, &c.*] "A single act of selling a parcel of silk handkerchiefs to a particular person is not a proof that the seller was *such* a hawker, pedlar, or petty chapman as ought to take out a licence by virtue of these acts of parliament."<sup>1</sup>

*And every other trading person.*] These words extend to the case of all itinerant dealers who sell by retail, how extensive soever their transactions may be, and are not restrained to persons of the same description as hawkers and pedlars, who deal in a small way, as will appear from the following case. The defendant was sued for penalties under the hawkers and pedlars' act. At the trial it appeared that the defendant travelled from town to town, and had packages of books, &c. weighing 1325*lb.* sent after him by the common stage waggon; that he took rooms at each town, and there sold such books, &c. by retail and by auction. The jury found a verdict for the plaintiff: and on motion to set it aside, on the ground that the words, "other trading person," applied only to petty dealers who carried their commodities with them, Abbot C. J. said he was clearly of opinion that the defendant was a trading person within the meaning of the act of parliament. He said that the argument urged on the part of the defendant, arising out of the extent of his dealings, would go to show that when the inconvenience to the resident tradesmen was the greatest, no offence would be committed.<sup>2</sup> These words also include licensed auctioneers and other agents who travel from town to town, and sell or expose to sale by retail the goods of their employers on commission, unless such agents come within the exceptions contained in s. 23 or 19.<sup>3</sup> It seems also that if a

<sup>1</sup> Per Lord Mansfield, C.J. in *Rex v. Little*, Bur. 613. and see *Rex v. Buckle*, 4 East 346.

<sup>2</sup> *Dean q. t. v. King*, 4 B. & A. 517.

<sup>3</sup> *Rex v. Turner*, 4 B. & A. 510.

person travel from town to town with goods, and in each town employ an auctioneer resident therein to sell them for him, the person so travelling from town to town is a trading person within the meaning of act.<sup>1</sup>

*Going from town to town, &c., and travelling either on foot or with horse, horses, or otherwise.]* On the part of the prosecution, it is sufficient proof of the defendant's going from town to town, to prove that he went from the town where he usually resided to another town, and there hawked his goods, or sold them by auction.<sup>2</sup> It seems at one time to have been supposed that, in order to subject himself to the penalties of the act, the defendant must have travelled with the goods which he had to sell, but it is now settled that the mode of travelling is wholly immaterial. In *Rex v. Turner*,<sup>3</sup> the goods were sent from town to town by public carriers' waggons, and the defendant travelled some part of the way in a public stage coach, and the rest of it in a post chaise, but the court of King's Bench held that he was a trading person within the meaning of the act. See also *Dean q. t. v. King*, 4 B. & A. 517.

II. Having now stated the cases which go to show what description of persons the legislature intended to be within these acts, the next part of the subject which requires consideration is, the penalties which such persons subject themselves to by attempting to trade without a licence, or to evade the provisions of the act.

By s. 17. it is enacted that if any such hawker, &c. shall trade as aforesaid, without, or contrary to, or otherwise than as shall be allowed by such licence, such person shall for every such offence forfeit the sum of 10*l*. And if any person, trading under or by virtue of any licence, &c., upon demand made by any person authorized, &c. or by any person to whom such hawker, &c. shall offer any goods to sale, shall refuse to produce and show his licence, or shall not have his licence ready to produce and shew to such person, &c., then

<sup>1</sup> *The Attorney-General v. Tongue*, E. 1823. 2 Burn. J. P. 785. *The Attorney-General v. Woolhouse*, 1 Y. & Jer. 463.

<sup>2</sup> *The Attorney-General v. Tongue*, E. 1823. *The Attorney-General v. Woolhouse*, 1 Y. & Jer. 463.

<sup>3</sup> 4 B. & A. 510.

the person so refusing or not having his licence ready to produce, shall forfeit 10*l*.

And by s. 20. persons trading without a licence, or refusing to produce it, may be detained and taken before a justice of the peace, which said justice is required to examine into the facts charged, and, upon proof thereof to convict the offender so trading without a licence, and thereupon it shall be lawful for such justice, and he is hereby required, by warrant under his hand and seal, to cause the said sum of 40*l*. (the sum of 40*l*. had been mentioned in the 19th section) to be levied by distress, &c.

*Trading without a licence.*] The fair meaning of the words "shall trade without a licence," in the 17th section, appears to be "shall trade without having obtained a licence."<sup>1</sup> But there is nothing in the statute to confine the operation of the words in that section to such persons only. There seems no reason why such trading persons as have obtained a licence, but travel without it, should not be within this clause of the section. They may certainly be brought within the clause immediately following, for refusing to produce or for not having his or her licence ready to produce, to persons authorized by the act to demand a sight of it. It seems also that if an unlicensed hawker sell goods which, even if he were licensed, it would not be lawful for him to sell, he is still liable to be convicted for trading without a licence. Thus, where the defendant, George M'Gill, was convicted under the hawker's act, for travelling from house to house and exposing to sale divers parcels of tea without any licence, it was contended that the defendant ought to have been convicted under 12 Geo. 3. c. 46. s. 6. which prohibits the selling of tea, except under certain regulations; but the court were of a different opinion. They said that 50 Geo. 3. c. 41. was passed to protect domiciled tradesmen; the other statute to assist the collection of duties; that the effect of the latter was not to destroy the prohibition contained in the former, but that the two provisions were con-

<sup>1</sup> Verba Bailey, J. in *Rex v. Websdale*, 2 B. & C. 136.

sistent and might stand together; that the first imposed a penalty upon persons trading at all as hawkers without a licence; the second imposed a penalty upon the sale of tea by hawkers even with a licence, and, therefore, that a person who exposed tea to sale as a hawker and had no licence, offended against both the above mentioned provisions, and was liable for a penalty for each breach of the law.<sup>1</sup>

There is much obscurity in this part of the statute. The 17th and 20th sections are in terms the same as the 11th and 14th sections of the 9 and 10 W. 3. c. 27., and in both these acts the same difficulty occurs as to the imposing a penalty of 10*l.* given by the one section, or of 40*l.* given by the other, for trading without a licence, &c. In practice convictions are always for 10*l.*; and in *Rex v. Websdale* it was decided, that a conviction in that penalty was proper. "It is fair to suppose that the sum in the 20th section should have been 10*l.* and not 40*l.* and that the latter sum was inserted by mistake."<sup>2</sup>

It may also be mentioned that, unless we suppose that the sum of 40*l.* has been inserted by mistake for 10*l.*, the statute is inconsistent with itself, as it enacts that the said sum of 40*l.* shall be recovered before a magistrate, whereas the 24th and 25th sections enact that penalties above 20*l.* incurred under this act, shall be recovered in any court of record of Westminster, and penalties below that sum before a justice of the peace.

By s. 19. persons hiring or lending a hawker's licence are made liable to a penalty of 40*l.*, with a proviso that nothing in the act shall subject to the said penalty any servant travelling for a licensed master with the licence of such master, and for his master; or any licensed master sending such servant to travel with such licence.

By s. 14. the packages, &c. of every licensed hawker are to have the words "licensed hawker," &c. written or painted on them; and every defaulter in this respect shall forfeit for every offence the sum of 10*l.* And by s. 15, persons not licensed using such words, shall forfeit for each offence the

<sup>1</sup> *Rex v. M'Gill*, 2 B & C. 142.

<sup>2</sup> *Verba Bailey, J. in Rex v. M'Gill*, 2 B. and C. 146.

sum of 10*l*. By s. 16. hawkers dealing in smuggled goods shall forfeit their licence. By s. 18. the penalty for forging a licence is 300*l*. The 7th section of the statute is that on which proceedings are most usually had recourse to. That section enacts, that after the first of August 1810, it shall not be lawful for any hawker, pedlar, petty chapman, or any other trading person or persons going from town to town or to other men's houses, and travelling either on foot or with horse or horses, either by opening a room or shop, and exposing to sale any goods, wares, or merchandize by retail in any town, parish, or place, such person not being a householder there, or the same not being an usual place of his or her abode, or by any other means or device to vend or sell, either by himself or herself, or by any auctioneer, whether licensed or not, broker, appraiser, agent, servant or other person on his or her behalf, any goods, wares, or merchandize whatsoever, by outcry, knocking down of hammer, candle, lot, parcel, or any other mode of sale at auction, or whereby the best or highest bidder is or shall be deemed to be the purchaser; and every person and persons so vending or selling contrary to such prohibition as last aforesaid, shall forfeit and pay for every offence the sum of 50*l*.

On this section it has been decided that the words, "by outcry, knocking down of hammer, candle, &c., or any other mode of sale at auction," govern the meaning of the whole preceding part of the section. The prohibition therefore extends thus far, that "it shall not be lawful for any hawker, &c., either by opening a room or shop and exposing his goods to sale by retail, or otherwise to sell by auction." It is the selling by auction which is prohibited by this section; the prohibition does not extend so far as to prevent a licensed hawker, &c. from opening a room or shop, and exposing to sale his goods, &c. by retail, provided he do not either by himself or by any auctioneer, agent, servant, or other person sell by auction. See *Allen v. Sparkhall*, 1 B. & A. 100.

III. The next points to notice are certain cases excepted out of the penalties and provisions of the act.

By 50 Geo. 3. c. 41. s. 4. it is enacted, that nothing in the act contained shall extend to hinder any person from

selling or exposing to sale any sort of goods or merchandize in any public mart, market, or fair, &c.

A mistaken notion seems to have prevailed formerly among the hawkers, that under the above proviso, or a similar one contained in 29 Geo. 3. c. 26. s. 17. they might expose their goods to sale on market days in any part of a market town, as they might have done before the passing of any of the hawkers' acts. But in *Rex v. Redfearne*,<sup>1</sup> it was decided that no hawker could lawfully expose goods to sale in any part of a market town but the public market place.

The next exemption from the penalties of the act is contained in the 23rd section. By that section it is enacted, that "nothing in this act shall extend to prohibit any person or persons from selling any printed papers licensed by authority, or any fish, fruit, or victuals, nor to hinder the real worker or workers, or maker or makers of any goods, wares, or manufactures of Great Britain, or his, her, or their children, apprentices, or known agents or servants usually residing with such real workers or makers only from carrying abroad or exposing to sale and selling by retail or otherwise any of the said goods, wares, or manufactures of his, her, or their own making in any mart, market, or fair, and in every city, borough, town corporate, and market town, nor any tinkers, coopers, glaziers, plumbers, harness menders, or other persons usually trading in mending kettles, tubs, household goods, or harness whatsoever from going about and carrying with him or them proper materials for mending the same."

*The real workers or makers of any goods, &c.*]—It has been decided that a person residing in London who bought books there in sheets and bound them up, and carried them down into the country and sold them at places where he did not reside, is not the maker of the goods within the meaning of this section of the statute, and that such person is therefore liable to penalties under the act.<sup>2</sup> But it has also been decided at N. P. that the exception extends beyond mere handicraftsmen, and that it comprehends within it

<sup>1</sup> 4 T. R. 273.

<sup>2</sup> Moore, q. t. v. Edwards, 2 Chit. Rep. 213.

wholesale tradesmen vending their own manufactures by means of their known agents or servants usually residing with them.<sup>1</sup> In *Attorney General v. Woodhouse*<sup>2</sup> the defendant appears to have been within the exceptions contained in the 23rd section; but the point was never raised, and he was convicted under the 7th section.

*In any mart, &c. and in every city, borough, town corporate, and market.*] — In *Rex v. Websdale*<sup>3</sup> it was decided, that the manufacturer of goods is allowed to hawk them in those places only which are mentioned in the 23rd section of that act. The defendant had been convicted for hawking shoes at Cromer without a licence. On appeal to the quarter sessions it was proved on behalf of the appellant, that he was a shoemaker, and that he was the real worker and maker of the shoes which he had exposed to sale; but as it appeared from the evidence that Cromer was not a mart, &c. nor a city, borough, &c. the sessions were of opinion that the conviction was good, and the court of King's Bench thought that they had decided right.

By statute 52 Geo. 3. c. 108. s. 1. no person being a wholesale trader in lace, in woollen, linen, silk, cotton, or mixed goods, or any of the goods, wares, or manufactures of Great Britain, and selling the same by wholesale, shall be deemed or taken to be a hawker, pedlar, or petty chapman, within the intent and meaning of the statute 50 Geo. 3. c. 41. or any other act relative to hawkers, pedlars, or petty chapmen, or of any or either of them, and all and every such person and persons, his, her, or their apprentices, servants, or agents, selling by wholesale only, shall go from house to house, and from shop to shop, to any of their customers who shall sell again by wholesale or retail, without being subject or liable to any of the penalties or forfeitures contained in the said statute 50 Geo. 3. c. 41. or in any of the said acts touching hawkers, pedlars, and petty chapmen.

<sup>1</sup> *Rex v. Thomas*, Lanc. Sum. Ass. 1827. coram Hullock, B.

<sup>2</sup> 1 Y. & Jer. 463.

<sup>3</sup> 2 B. & C. 136.

Sect. 2. Nothing in the said statute 50 Geo. 3. c. 41. shall extend to prohibit any person from carrying about coals in carts or on horses, mules, and asses, and selling the same by retail, or subject any such person to any duty, penalty, or forfeiture imposed by the said statute 50 Geo 3. c. 41.

• IV. The last point of the subject for consideration is the proceedings for the purpose of enforcing the provisions of the act.

By 50 Geo. 3. c. 41. s. 24. all pecuniary penalties incurred under this act of a greater sum than 20*l*. shall be recovered with costs in any court of record at Westminster, by action of debt or information, wherein no essoign, &c., and only one imparlance shall be allowed; and one moiety of every such penalty shall belong to his Majesty, and the other moiety to the person who shall sue for the same.

By s. 25. it is enacted, that in all cases where the pecuniary penalty by this act imposed does not exceed the sum of 20*l*.; it shall be recoverable before one justice of the peace of the county, &c. wherein the offence shall be committed, and one moiety of every such penalty shall belong to the king, and the other to the informer; and in case of non-payment, the said justice, by warrant under his hand and seal shall cause the same to be levied by distress and sale, &c., and shall commit the offender to prison, there to remain until the said penalties, &c. shall be levied by such distress and sale.

But by s. 26. no person committed under this act shall be detained in gaol more than three months.

By s. 27. an appeal to the next general quarter sessions of the county, &c. is given to the party aggrieved by the judgment of any such justice: but the appellant is required to enter into a recognizance with two sufficient sureties to the amount of the penalty, together with an adequate sum to answer the costs which may be awarded; and the justices at the said sessions are empowered to hear and determine the same, or at their discretion to state the facts specially for the determination of the court of K. B. thereon.

The 29th section enacts, that no conviction upon the



act shall be removed by certiorari or otherwise into the court of K. B. or any other court, save upon appeal as by the act directed.

Every justice before whom any conviction shall be made under the act is required to transmit to the commissioners for licensing hawkers, accounts of convictions and of the penalties due to his Majesty, and to pay over the money in their hands to the clerk of the peace, who shall remit the same to the commissioners.<sup>1</sup>

Persons sued for any thing done in pursuance of the act may plead the general issue, and give the special matter in evidence: and if the plaintiff do not succeed in his suit, the defendant shall have treble costs.<sup>2</sup>

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#### ART. XI.—CHURCH-LEASES AND TITHE COMPOSITIONS.

*An Essay on the Power of Rectors and Vicars to grant Leases with the Consent of Patron and Ordinary, &c.* By W. C. WALTERS, Esq. of Lincoln's Inn, Barrister-at-Law, and Fellow of Jesus College, Cambridge. London, 1828.

THE main object of this pamphlet is to inform the beneficed clergy that they are in possession of a privilege, by exercising which they might benefit both themselves and their parishioners. An incumbent, we are told, may, with the consent of the patron and ordinary, make leases for three lives, or twenty-one years, binding on his successors; and as a tenant for a term certain can afford a larger rent than a tenant subject to contingencies, at the first view it certainly seems rather odd that such leases should be universally disused, which the author assures us they are. In order to solve the enigma, we proceed to give a short summary of his observations.

He shows that, at common law, a rector or vicar might,

<sup>1</sup> Sect. 30.

<sup>2</sup> Sect. 34.

with the consent of his patron and ordinary, make "leases for lives of years, without limitation or stint;"<sup>1</sup> and that the only statutes affecting the right are the 13 Eliz. c. 10. s. 3. and the 18 Eliz. c. 11. By the first of these, it is enacted, "that all leases by a parson or vicar, or any other having any spiritual or ecclesiastical living, other than for the term of twenty-one years, or three lives from the time as any such lease shall be made, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term, shall be void, and of none effect." By the second (18 Eliz. c. 11.) it is enacted, "that all leases made by the persons comprised in the 13 Eliz. of lauds, whereof any former lease for years is in being, not to be expired, surrendered, or ended, within three years next after the making of any such new lease, shall be void and none effect;" and bonds, &c. for evading the above provisions are declared void.<sup>2</sup> The author attributes the non-exercise of this right to the 13 Eliz. c. 20. which provides that "no lease of any benefice or ecclesiastical promotion with cure, or any part thereof, not being impropriated, should endure any longer than while the lessor should be ordinarily resident, and serving the cure of such benefice without absence above eighty days in any one year." The incumbent offending against this statute was to lose one year's profit of his benefice; and a rector has been allowed to eject his own lessee, on the ground of his own non-residence.<sup>3</sup> It was repealed, however, by 43 Geo. 3. c. 84. s. 10. and no equivalent provision has been enacted since; except that by 57 Geo. 3. c. 99. "no contract or agreement for the letting of the house of residence, or the buildings, gardens, orchards, and appurtenances, necessary for the convenient occupation of the same, belonging to any benefice, in which house of residence any spiritual person shall be required, by order of the bishop, to reside, or which shall be assigned as a residence to any curate by the bishop, shall be valid:" and a summary process is given for ejecting the tenant, should he refuse to give up possession.

The rules to be observed in granting leases of the kind alluded to are next particularized.

<sup>1</sup> Co. Litt. 44 a.<sup>2</sup> See 43 El. c. 9.<sup>3</sup> *Frogmorton v. Scott*, 2 East, 467.

1. The lease must be by deed indented<sup>1</sup>
2. Must begin from the making thereof.<sup>2</sup>
3. A lease if concurrent must be for years, as must also the existing lease, which must be absolutely determined within three years from the making of the concurrent lease; for the statute only allows one kind of lease to be existing at the same time; and if there be an existing lease for lives, a concurrent lease for lives cannot be made.<sup>3</sup>
4. It may be for a less term, though it must not exceed three lives, or twenty-one years.
5. It must be of tenements for which a rent, recoverable by the successor, may be reserved.<sup>4</sup>
6. The tenements must have been commonly letten to farm, or occupied by the farmers thereof, by the space of twenty years next before the lease of be made.<sup>5</sup>
7. The accustomed rent, or more, must be reserved.<sup>6</sup>
8. The lessee must be punishable for waste.<sup>7</sup>
9. The patron and ordinary must assent by deed.

<sup>1</sup> 28 H. 8. c. 28. s. 1. Vaugh. 197.

<sup>2</sup> 13. Eliz. c. 10. 2 Lev. 61. But a lease made for 20 years, to begin at Michaelmas next, is said to be a good lease. Wood's Inst. 282.

<sup>3</sup> 10 East, 184, 185. Bac. Ab. Leases, E. In accounting for the law as stated above, Mr. W. (p. 17.) has copied an error of Lord Ellenborough.

<sup>4</sup> A lease of tithes is valid. 2 Saund. 304, n. 9 & 10; and see 5 Geo. 3. c. 17. Coal, stone, and other minerals cannot be demised. Knight v. Mosely, Ambl. 176. Parsons, says Lord Eldon, may fell timber or dig stone to repair; and they have been indulged in selling such timber and stone where the money has been applied in repairs. 3 Mer. 427.

<sup>5</sup> Any species of tenancy will satisfy this rule. Sugden on Pow. 572, "Most commonly" requires that the subject demised should have been in the hands of tenants at least eleven years during the twenty years preceding. Co. Litt. 44. b. And see Doe v. Lord Yarborough, 7 B. More, 258. S. C. 1 Bing. 24, in which it was decided that a lease of waste land, which had always been left unclosed and unproductive till the demise, was not binding on the successor. If a piece of land not letten before were demised with tenements that had been letten, the lease would be thereby void. Doe v. Rendle, 3 M. & S. 99. Land newly inclosed may be letten by 41 Geo. 3. c. 102. s. 38.

<sup>6</sup> Doubts exist as to the construction of this rule. Hale C. B. & Holt C. J. have held that the words "accustomed rent" must be understood of the rents last reserved. Morrice v. Antrobus, Hard. 325. Orby v. Molsem, Gilbert Cas. in Eq. 53. According to them a rent once reserved can never be diminished. Lord Cowper was of a different opinion. Gilb. Cas. in Eq. 58. Perhaps, says Mr., W., that rent which had been paid for the greatest number of years within the preceding twenty years, would now be deemed 'accustomed.'

<sup>7</sup> Co. Litt. 44 b.

Provided the lease be confirmed during the incumbency of the lessor, the time of confirmation or assent is immaterial; it may be before or after the making of the lease, and by persons who were not patron and ordinary at the time of making. We think it right to add, that it has never been decided whether tenements, usually let separately, may be let together, though the converse of the proposition is clear.<sup>1</sup> Mr. W. has brought together all the learning on this subject, and inclines in favour of the validity of the lease. He suggests, however, the expediency of reserving a distinct rent in respect of each tenement.<sup>2</sup>

The points we have noted occupy the greater portion of the pamphlet. They are deduced with clearness, and illustrated with learning; yet we cannot help thinking that the remarks on compositions for tithes, which we find in the shape of an appendix, are the most valuable division of the work; as (to use his own expressions,) "they convey information on a subject in which the parochial clergy are much interested, and which, we believe, cannot be found collected elsewhere."

A composition has been defined to be "a money payment for the whole year, substituted for tithes in kind; leaving to the occupier to cultivate as he pleases, free from apprehension of being compelled to render an account."<sup>3</sup> This, unless by deed confirmed, of course determines by the death or resignation of the clergyman, and questions have frequently arisen as to the right of the executor of an incumbent, dying before the day on which the composition was made payable, to an apportionment. The better opinion seems to be that the statute 11 Geo. 2. c. 19. s. 15. which enables the executors of tenants for life to recover an apportioned part of the rent, does not apply to a lease of or composition for tithes.<sup>4</sup> If therefore an incumbent makes a composition, and dies during the year or half year, his executors are neither entitled to an

<sup>1</sup> 39 & 40 Geo. 3. c. 41.; and see 5 B. & A. 386.

<sup>2</sup> The stamp duty, Mr. W. thinks, need only be paid upon the aggregate amount of the rents, and not upon each separately, as there would be but one letting. He cites *Boase v. Jackson*, 6 Moore, 480. S. C. 3 B. & B. 185.

<sup>3</sup> Per Sir T. Plummer, 2 Ves. & B. 335.

<sup>4</sup> Mr. W. states this to have been the opinion of Mr. Charles Yorke, Mr. Wilbraham, Mr. Burton, and Mr. Serjeant Hill. It was so held by Sir T. Plummer, 2 Ves. & B. 334.

apportioned part of the composition, nor to the tithes accruing between the last day of payment and the death of their testator;<sup>1</sup> the composition excluding the payment of tithes in kind. To obviate this, Mr. W. recommends that the payment of a proportional part should be expressly stipulated for at the making of the lease or composition. But though the executor has no remedy against the party compounding, — should the successor receive the amount for the whole half year during part of which his predecessor was alive, it seems that equity will compel him to account;<sup>2</sup> the proportion being determined by the time which had elapsed, and not by the value of the tithes accruing from the death of the parson to the succeeding day of payment.

An unconfirmed lease or composition determines by the death of the incumbent, and no notice to quit is necessary. But if the successor, against whom a lease for years is void, receives rent accruing due thereby on his own account, such receipt of rent, if adequate to the value of the premises, will establish a tenancy from year to year, though not amounting to a confirmation of the lease. A composition stands upon the same footing. With a freehold lease it is different; for it can only be avoided by entry; and if the successor waives his right to enter, as by accepting the rent reserved, he cannot afterwards avoid it.<sup>3</sup> The same notice is necessary to determine a composition for tithes as in the case of land, and it must expire in like manner with the current year of the composition. The author seems to think it doubtful whether 28 H. 8. c. 11. enacting that if at the death of a parson or vicar there should be one year to come in a lease granted by him then that the lessee might enjoy his lease to the end of the same year into which he was entered at the death of his lessor, was repealed or not by 1 & 2 Ph. & M. c. 17.; and we must add this to the other cautionary hints with which he has plenteously supplied us. These alone would establish the utility of his publication, were there nothing else to mark it; but they certainly induce us to suppose that it is neither from ignorance nor misconception that the rights of the

<sup>1</sup> 8 Ves. 310. per Lord Eldon.

<sup>2</sup> *Hawkins v. Kelly*, 8 Ves. 308. *Ayersley v. Wordsworth*, 2 Ves. & B. 331.

<sup>3</sup> *Essay*, p. 41.

clergy have been partially disused. The fear of litigation, and the trouble and expence of procuring assents, not merely a repealed statute, have brought about the forgetfulness or inactivity from which Mr. W. has volunteered to rouse them. Let the legislature remove the doubts alluded to, and facilitate the process of leasing (if indeed it be possible to do so without impairing the patrimony of the church); and very soon, we venture to say, the clergy will be found improving their property by granting terms like other landholders.

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ART. XII. — REFORMS IN CHANCERY.

*A Brief Account of some of the most important Proceedings in Parliament relative to the Defects in the Administration of Justice in the Court of Chancery, the House of Lords, and the Courts of Commissioners of Bankrupt: together with the Opinions of different Statesmen and Lawyers as to the Remedies to be applied.* By C. P. Cooper, Esq. 8vo. pp. 436. 1828.

It is not sufficiently considered in the present day, that the science of legislation, mixed up with a project of reform, is one of the most perplexing subjects that can occupy the mind of a statesman. Observing the partial dilapidation which the old fabric of our laws has from various causes undergone, we give the rein to our expectations, and would have a new and beautiful structure, by a species of mental magic, at once erected in its stead. But such a work demands both time and deliberation. It is comparatively an easy task to discern evils which are exerting an actual pressure upon society; they are obvious to the senses, and may be estimated both by tale and weight: but to strike the balance truly between present evils and those which the many peradventures, the remote consequences, and obscure relations, and all the possible and hidden effects of a change may originate, requires a more prophetic spirit than the common run even of wise men are gifted with. It will also be remembered by those who do not industriously for-

get, that the institutions of a free people, especially those which relate to the administration of justice, in which all classes are concerned, are the result of national character; and that when fixed and established, they give back a corresponding influence, and introduce a train of consequences closely interwoven with the manners of society, and bearing upon its modes and habits of thought. This double and mutual influence—this relation which subsists between national character and national institutions, is full against the adoption of any half-considered plans of reform, and urges upon us the necessity in all such cases of free discussion and much deliberation. In old-established governments there is not perhaps much cause for apprehending the omission of these requisite preliminaries; for no sooner is the question of reform proposed, than a violent struggle commences between two opposite parties in the state. The one actuated either by motives of interest or of prejudice, sees perfection only in the present system of things, however obnoxious it may be to the charge of corruption both in the principle and administration; the other dwelling upon some pure and abstract speculation of an absolute good, on the discovery of a pregnant evil, insists upon utter demolition of the old system, and the erection of a new one upon its ruins. The existence of these two parties is indeed more easily recognised in questions of politics and religion by which the passions of men are more violently agitated. But we have the same principles operating in the discussion (now the prevailing one of the day) of the reform of our laws. Although the truth lies probably between these parties, we are not unfriendly to the existence of both. With all impartial men we admit the necessity (and that a grievous and a pressing one) of a reform, both in the laws themselves and in the structure of the courts by which they are administered, but especially of that court on which the stigma of public execration has been so deeply fixed; yet we cannot shut our eyes to the evils inseparable from the introduction of a comprehensive reform; evils which consist not merely in the practical difficulties incident to it, but in the effects likely to be produced upon the public mind. These evils are in fact mitigated by the opposi-

tion of those who cast upon every change, whether beneficial or not, the invective term of innovation, the whole influence of which is spent in making the reform gradual, and creating only such an interval between its proposal and final adoption as gives scope and opportunity to discussion : and we are told by Lord Bacon, "that things will have their first or second agitation ; if they be not tossed upon the arguments of counsel they will be tossed upon the waves of fortune and be full of inconstancy, doing and undoing like the reeling of a drunken man." But as none of the grand and spirit-stirring revolutions which have taken place either in the affairs or opinions of men, in science or in government, could have been achieved without the union of powerful talents and fervent enthusiasm, we can least of all dispense with the aid of those who by many are called the *zealots* of reform ; for among this class we shall find men distinguished by the variety of their knowledge, the largeness of their views, the freedom and vigour of their conceptions. But we dare not trust ourselves wholly with these. It was said of the emperor Septimus Severus, "*Juventutem egit erroribus imo furoribus plenam*:" thus it frequently is with new systems and early reformers ; they are apt to run into errors and wildnesses, and, looking only upon great and characteristic features, they despise or hold cheaply the practical difficulties of detail. It would therefore be an act of folly to adopt any suggestions, how beautiful and just soever in their proportions, or apparently adequate to accomplish the end proposed, without submitting them to a severe and jealous scrutiny ; especially where (as in the reform of long-existing laws) a variety of mixed considerations exists, and conflicting interests must inevitably perplex the action of any new system whatever. There is perhaps no better method of observing this precaution, than by the appointment of commissions of inquiry, composed of men bearing these characteristics of competency for the task — knowledge, talent, and impartiality.

We are disposed to congratulate our readers on the issuing of two commissions (since the publication of our first number) founded upon this principle, and instructed to enquire into the mode of proceeding in actions brought in courts of law,



and into the state of that great branch of the laws which relates to real property ; to state the evils and defects which prevail in these subjects of their inquiry ; and to propose the fitting and adequate remedies. We trust that the issue and result of their labours will be more propitious to the public welfare than that of the Chancery commission. The new orders which we slightly noticed in our former number hardly touch the evils which render that tribunal, called of justice, a ready instrument of oppression ; and deeply are we disappointed and grieved, that as yet the parade and circumstance which attended the conceding of that commission have not been answered by a corresponding practical benefit.

In carrying on the discussion relative to the reforms which must be introduced in the procedure of the Fabian court (if it is to be rendered an efficient branch of the judicature), we cannot do better than introduce to the notice of our readers the useful and able publication of Mr. Cooper. Lawyers are reproached with refusing their aid or with being unwilling coadjutors in advancing real and efficient reforms : their great goddess, Abuse, must be revered and her temple upheld, for thereby they exercise their craft and have their wealth. We need hardly stop to refute a charge at once obviously false and vulgar, and which is as vapid as a thrice-told tale ; a practical refutation is afforded by publications such as this of Mr. Cooper indicating, at least, the will not to be wanting in setting forward a good and sacred cause.

But it has been more strangely and as confidently asserted, that lawyers have not the faculty of discerning the evils that overspread the institutions and obstruct the course of justice ; and that they are not only unwilling but unable to perceive the necessity or to aid in the work of reform. To these assertions we yield our willing admiration, not, indeed, at their truth, but at their gratuitousness ; we admire the ingenious and fanciful logic, which by an unknown and mysterious process is able to persuade a man into a belief utterly inconsistent with fact and history, and even with the dictates of common sense. If we might trust our own memory, we should say, that with one exception the project

of reforming the laws of a nation was never yet accomplished without the aid of lawyers; and we are able to account for this notable phenomenon only by supposing, that to profess some knowledge of the laws as they exist, and some, if not a familiar, acquaintance with their practical operation, and as a means, whether ill or well adapted, to attain the ends of justice, may casually be of value in the character of a reformer.

The publication we have placed at the head of this article is with great propriety dedicated to Mr. M. A. Taylor. No man either in the House of Commons or out of it is so well entitled to this testimony of respect. Should a real and efficient reform be introduced into the court of Chancery, it will be to his resolute exertion, not abated by ill or but partial success, by the hostility of open enemies or the treachery and desertion of professed friends, that the people of England will owe so rich a boon. But should all [his exertions fail, or end only in a superficial reform, he will not want one species of consolation—the consciousness of having performed a great and arduous duty; and he may then adopt the language which was once addressed to a debased and profligate senate against a wretch, the very enormity of whose crimes and rapacity had well nigh purchased his acquittal: “Ego hoc tamen assequar ut iudicium potius republicæ, quam aut reus iudicibus aut accusator reo defuisse videatur.” (Cic. in Verrem.) He will at least have made it obvious to the world, that the state stands idle for want not of a public abuse to be condemned, nor of an honest man publicly to denounce it, but of a just and impartial and unfettered tribunal to set about the work of redress.

The original purpose of the author was to provide members of parliament with a manual or abstract, drawn from authentic sources, of the proceedings which from time to time have taken place in parliament relative to the court of Chancery, the House of Lords, and Privy Council, as courts of appeal, and the court of Commissioners of Bankrupt; upon this have been engrafted some of his own opinions on the important subject treated of, and the methods by which he proposes to remedy the grievous evils which prevail in the administration of justice in these several courts.

Delay in deciding the cases which have come into the court of Chancery, has been the vice of that court from the earliest periods of its history. With few exceptions, none of the Chancellors have been able to prevent an accumulation of arrears. The evil had become so grievous and notorious, that during the commonwealth, when men had fully earned liberty of speech, the clamours raised against the court produced a resolution of the parliament that the court should be abolished, and a committee was appointed to consider of a substitute, and of the method by which matters of equity should be determined. We cannot be surprised at such a resolution; the representations made to the house by various members, were of a character to justify the most violent and hasty proceeding. The following account of the debate, taken from the Parliamentary History of England, is given by Mr. Cooper.

“ In the course of the debate the court of Chancery was called by some members the greatest grievance in the nation. Others said that for dilatoriness, chargeableness, and a faculty of bleeding the people in the purse-vein even to their utter perishing and undoing, that court might compare with, if not surpass, any court in the world. That it was confidently affirmed by knowing gentlemen of worth, that there were depending in that court 23,000 causes, some of which had been there depending five, some ten, some twenty, some thirty years and more; that there had been spent therein many thousand pounds, to the ruin, nay, utter undoing of many families; that no ship almost that sailed in the sea of the law, but first or last put into that port, and if they made any considerable stay there, they suffered so much loss, that the remedy was as bad as the disease; that what was ordered one day was contradicted the next, so as in some causes there had been five hundred orders and more; that when the purse of the clients began to empty, and their spirits were a little cooled, then by a reference to some gentleman in the country, the cause so long depending at so great a charge came to be ended; so that some members did not stick to term the Chancery a mystery of wickedness, and a standing cheat, and that in short so many horrible things were affirmed of it, that those who were or had a mind to be advocates for it, had little to say

on the behalf of it, and so at the end of one day's debate the question being put, it was voted down."

Whether the representation here given of the court is at all and in what degree applicable to its present condition, we leave our readers to judge.

In all great national convulsions, when physical force must at last determine between the contending parties, and the affections of the people are to be won over and conciliated, the never-failing resource of both parties has been a reform, or a promise of reform, in the laws, and a speedy determination of suits. We accordingly find the history of the proceedings in parliament, from the commencement of the rebellion to its close, full of debates, resolutions, and ordinances for removing grievances in the laws and in the administration of them. Cromwell, actuated by the love of justice or of power, or of both, well knew the value of the same art, and how to practise it. His ordinance for better regulating and limiting the jurisdiction of the high court of Chancery is well known. In one of his speeches to the parliament he says, "The Chancery hath been reformed, and I hope to the satisfaction of all good men, and for the things depending there, which make the burden and work of the honourable persons entrusted in those services beyond their ability, it hath referred many of them to those where Englishmen love to have their rights tried—the courts of law at Westminster."

But all the labours which distinguished this period proved abortive. The return of the king was a restoration in the fullest and most unqualified sense; and as if he and his adherents thought their triumph would otherwise be imperfect and inglorious, every legislative measure passed during the commonwealth and protectorate was abrogated, and every institution reduced to the same evil condition in which the former reign had left them. No efficient reform in the court of Chancery has since taken place. The evils incident to the administration of justice by this tribunal are now increased to so frightful a degree and have assumed so serious an aspect, that the work of reformation must be begun. Much, indeed, of opposition is to be expected whenever a public measure is in progress which involves the sacrifice of a great mass of private interest; but although even an honest

minister may be harassed and discouraged by resistance from this quarter, yet we deprecate any admission of the principle which is now boldly asserted by some, that long enjoyment of either emolument or patronage, of profit or place, derived from a public nuisance, gives a prescriptive right to its continuance or to compensation for its removal. Possession originally got by iniquity is entitled to no respect; it is not a proper subject for compromise, but must stand or fall altogether, as in a mere trial of strength. Society is never bound, although from motives of policy it may sometimes be induced, to buy back its rights; and of these rights there is none so sacred and unalienable as the right to a pure and simple, a cheap and expeditious administration of justice. In removing the various obstacles which lie in the way of this, we may admit of delay, but can never brook denial. But of this we entertain no fears; the mercenary herd which has an interest in public abuses may make a show of resistance, but will be dispersed before a vigorous and intrepid attack. The spirit of evil is essentially a base and dastardly spirit, and all who bow down and serve it receive the impress of its character.

There is, however, a diversity of opinion as to the sources from which the delay and the expence of obtaining justice in the court of Chancery originate; whether in the law of the court, in its rules of practice, or in its form and organization.

It is very evident that before a proper remedy can be administered, the true seat and nature of the disease must be ascertained.

Mr. Cooper has addressed himself principally to the delay of the court, an evil distinct from the expence of litigation: for although frequently mixed up with it, yet in such cases, if the causes of expense were taken away, this form of delay would no longer exist; but that which may most properly be called delay is that motionless condition of a cause between its being set down for hearing and being heard. The average time which elapses between these periods is from 18 months to two years, and whatever be the amount of grievance at which different persons may be pleased to estimate this delay, the whole of it is solely chargeable upon the court, not upon

the court personally, but upon its structure. Mr. Bickersteth's evidence before the Chancery Commissioners with respect to this particular grievance, is distinguished for its uncompromising and straight-forward character. The attention of the public cannot be too frequently directed to this important topic. The following is an extract from the Appendix (A.) to the Report of Chancery Commissioners.

“ Q. 202. In the commencement of your examination, you stated that one of the stages in which great delay is occasioned to the suitors, is in the stage between the setting down the cause and the hearing; that is, between the cause being ready for hearing, and the hearing?—A. I think that in many cases the delay which happens in that stage of the cause exceeds the amount of all the other unnecessary delays put together, and it is a delay of which, it appears to me, the suitors and the public have great reason to complain; when a cause is prepared for hearing, and set down for that purpose, I conceive that the suitors are then making a direct demand upon the court for justice, and that every unnecessary delay which afterwards takes place, and is not occasioned by the parties themselves, is a violation of the laws which forbid the delay of justice.”

It is only by such simple but emphatic statements as this, that the nature of the evil of which all men complain can be duly appreciated, or be tracked home to its proper origin.

To the extent to which this cause operates in producing delay, or as it has been properly termed, denial of justice, it is quite evident that the recent orders promulgated by the Lord Chancellor can have no operation whatever. Mr. Cooper observes upon this part of the subject,

“ Orders of the Lord Chancellor, founded upon some of the most useful propositions contained in the report of the Chancery Commissioners, may expedite the cause prior to its being set down to be heard, and when it is in the master's office, or may retrench some useless expence; but they cannot advance the causes one day when they are once set down to be heard. Such orders, by hastening the time of the original hearing, and the hearing on further directions, would rather aggravate than diminish the present grievance, as the causes

must remain on the list during a longer period, before they could be heard."

The obvious effect of this deplorable tardiness in the operations of the court, is to drive many parties who have instituted suits, to an unwilling compromise; by which, in all probability, one of them obtains what in strict right belongs to the other, and thus induces a sacrifice of rights as being preferable to the mode by which only they can be ascertained and enforced; and it diminishes, as the author justly observes, the number of suits which, had there existed a prospect of obtaining justice in that moderate space of time required by every well-regulated system of judicature, would have found their way into the court.

We need not enter into any detail of the facts by which this latter position is established. The slightest knowledge of the principles on which men act, would alone carry us to this conclusion, without going into an elaborate investigation of the number of bills filed at different periods of time in the last century, and comparing them with the gradual increase of wealth which, under ordinary circumstances, would have produced a corresponding increase of litigation. The fact is likewise notorious, and as men do not, with equal pace, become either wiser or better, more inclined to suffer wrong, or less inclined to inflict it, we confess that to our apprehensions the only method by which the enigma (if enigma it be) can be solved, is by referring it to the delay to be endured, if the party aggrieved were to seek redress by the slow process of public justice.

No man will deny that this state of things calls for some prompt and vigorous measure of reform: that the court of Chancery must be made an effective tribunal, and being no longer what it is at present, a *close* court, confined to those who either have the wealth to afford, or the hardihood to brave a conflict, be thrown open to all who have matters in dispute lying within its jurisdiction. We see no reason why the *luxury* of litigation should be enjoyed only by the rich and foolish.

Attributing the main delay to the want of a sufficient number of judges to transact the business of the court, Mr.

Cooper advocates the proposition of creating an additional judge, so that there may be three *efficient* judges for disposing of original causes.

It is not for any who appreciate the various difficulties which unavoidably arise in the course of public affairs, and who own no sympathy with the views and motives of political partizanship, to over-estimate the gravamen of a public evil; but the spirit of impartiality utters a deeper denunciation against every evil, the existence of which is palpable, and the pressure great and intolerable; and an evil inherent in the system of administering justice must create in the mind of every impartial person a spirit of inveterate hostility; war to the knife is to be proclaimed against it. The existence and increase of this feeling is now so notorious, that its demands must ere long be granted. Nor do we think that with regard to the particular grievance to which we are adverting, the mode by which redress is to be afforded involves any such complex considerations as to justify a protracted delay. The simple statement, that there exists at the present moment an arrear of causes ready for hearing, which the judges of the court cannot subdue and keep down, shows the remedy to be as obvious as the grievance is oppressive and intolerable—it consists either in the appointment of an additional judge, or, which amount to the same thing, the subtraction of particular subjects from the jurisdiction of the court of Chancery, and transferring them to some other independent tribunal. There are, perhaps, fewer objections to the former course; especially as the legislature, by the creation of the office of Vice Chancellor, has already clothed the principle of this measure with its own sanction, and has destroyed an argument (a reason it never was) which might otherwise have been raised against it, of the danger and inexpediency of breaking in upon ancient institutions.

The course of these observations involves the opinion that the Lord Chancellor cannot be looked upon as an *efficient* equity judge. If any doubts existed upon this subject before the Chancery Commissioners presented their report the formidable display of duties incident to the office of Lord Chancellor to be found in that report, cannot fail to remove them. The greater number of these duties being of a political cha-



acter, has, however, given rise to a discussion upon the union in one person of political and judicial functions, and the expediency of separating them; out of this the further and consequent enquiry arises, whether the office of Chancellor shall be deprived of its political, or of its judicial character.

We are induced by the great interest and importance of this subject, to offer to the attention of our readers the following extract from Mr. Cooper's book.

"It requires but a slight glance at some of the memoirs, which serve to illustrate our history, to be convinced that the inconvenience resulting to the equity suitors from the political character and avocations of the Chancellor, has been experienced from an early period. Not to go back to those times when all our institutions were in their childhood, when a bishop or a general was considered a fit person to distribute justice to the subject in the principal tribunal of this country, we are informed, that immediately after the restoration, Clarendon, who had been bred and had practised as a lawyer, found his political engagements too great to admit of his devoting that time to the investigation of equity causes, which their growing number and importance demanded, and he was, therefore, compelled to have recourse to an expedient which Wolsey, Hatton, and Williams had adopted, though for a different reason. Wolsey, Hatton and Williams being ignorant of the equity they were called upon to administer, wisely employed able civilians or common lawyers, to assist them in enquiring into and adjudicating the different cases that were brought before them; and Clarendon perceiving that the distractions arising out of his functions as a minister, left him no leisure for examining the affairs of the equity suitors, made no important decree without the assistance of one or two judges. Between the time of Lord Clarendon and Lord Hardwicke, more than one chancellor died a martyr to the efforts which, to their everlasting honor, they made, that the causes of the suitors should not suffer by the political engagements of the judge.

"When we recall the names of Walpole, Pulteney, and Pelham, and the history of the changes that took place in the composition of the cabinet from 1736 to 1756, and the

prominent part that Lord Hardwick acted in all the public affairs of his time, we cannot doubt that however indefatigable he was in the various toils of his office, his political duties must have greatly diminished his efficiency and utility as a judge; and this was probably the source of the complaints of tardiness and indecision, which we have before seen were brought against him, in despite of the immense quantity of business he got through, when compared with what has been disposed of by the Lords Chancellors of the present day. Lord Hardwicke frequently sat in his court until after midnight, and by that means, for a time, subdued the arrears of his court. It is obvious, however, that neither the bench nor the bar could long support such extraordinary exertions, and it was soon felt and acknowledged that nothing is gained by the suitors, by decisions made when the faculties of the judge and counsel are exhausted; and succeeding Chancellors have seldom prolonged their sittings to the late hours that Lord Hardwicke did.

“ We shall probably never again see a greater equity lawyer than Lord Thurlow, who succeeded to the seals about twenty years after Lord Hardwicke; but it has been said that he disappointed the expectation his judicial qualities had raised, and that the justice of the court did not flourish more under his superintendence than in prior and subsequent times, and this can be attributed to no other cause than his political distractions. In his time, the Chancellor had discontinued his early sittings at the House of Lords. One or two hours, from two to three or four o’clock, for two or three days in the week, was all the time Lord Thurlow devoted to hearing appeals in the court of dernier resort; and although the same rule was followed with few exceptions by his successors, down to 1813, the Chancellors must have availed themselves of the time thus gained, rather from the performance of their political than their judicial functions, as these pages and the records of the court, show a diminution instead of an increase in the quantity of business done by the presiding judge.

“ Nor ought it to be deemed matter of reproach to those distinguished persons who have filled this high office, that they have dedicated themselves to the public affairs, involving the welfare of

the whole community, in preference to those matters which affect only private and individual interests. The labours of a principal minister of the crown must incontestibly be greater, and must demand more of the Chancellor's time than they did in former ages; and the Chancellor must not neglect the national weal for the sake of adjudicating the rights and claims of those who have the misfortune to be involved in litigation; and if there be from this cause a denial of justice to the subject, if the fortunes of the suitors are swallowed up in the gulph of Chancery, and they themselves often brought by anxiety, delay and disappointment, to a premature grave, the fault is not with the Chancellor, who does not perform the various duties attached to the Great Seal, but in the legislature, which places on the shoulders of one person, a load which, for centuries, has been too great for the most gigantic strength to bear."

The assertion that the present number of judges for determining matters in Chancery is insufficient, may appear to some to be inconsistent with the fact that there is no arrear of business at the Rolls. This circumstance has, however, been produced by causes which, arising out of the peculiar condition of that branch of the court, must in a very brief space cease to operate. It is notorious that the great tide of business in Chancery has invariably set in upon that part of the court which, in the opinion of the profession, is for the time distinguished for superior ability and despatch; and if there has ever been an individual judge to whom this character has been conceded even by acclamation, that individual is to be found in the present Master of the Rolls.—It was a high distinction for which the Roman historian celebrated Nerva Cæsar,—*res olim dissociabiles, miscuerit, principatum ac libertatem.*" He contrived to blend together two principles which till then had been thought utter irreconcilable, liberty in the subject, and absolute dominion in the prince; but however admirable such a conjunction may be, yet as it serves to give credit and stability to a form of government, the *nature* of which is inconsistent with the liberty and happiness of the people, the virtues of such a man, if we follow them to their remote consequences, exercise an influence productive of infinitely severer misery than even the most detestable ty-

ranny. Sir John Leach has in like manner exhibited the not less singular phenomena of promptitude and despatch in the determination of a suit in the court of Chancery. But where the security against delay in hearing and deciding causes is merely personal and not in the form and structure of the tribunal itself, the mitigation of the evil of delay is "like angel visits, few and far between;" and he by whom such an effect is produced, giving force and currency to the false assertion that the institution itself is perfect and adapted for all the purposes of justice, unconsciously perpetuates or prolongs an evil with which his personal virtues have no correspondence whatever. It is, however, highly probable that the power retained by solicitors of setting down their causes before the judge they like best, will shortly cause so great an accumulation of business at the Rolls, that not even the extraordinary talents of the judge now presiding in that court will be able to keep them from running into arrear; and convinced as we are that the present number of judges is insufficient, we trust that by this means, the argument derived from this source, which has some plausibility, but no truth to recommend it, will be exposed and driven from the field. The following account, taken from Mr. Cooper, will show that the conjecture, as to the bulk of business being carried before Sir John Leach, and in so great a proportion as eventually to produce an arrear, is not without foundation.

"From Easter Term, 1826, to Hilary, 1827, there were set down to be heard before the Vice Chancellor (then Sir John Leach), 259 rehearings, causes, exceptions, and further directions; whilst from Easter Term, 1827, to Hilary Term, 1828, there were set down to be heard before the Vice Chancellor, 184 rehearings, causes, exceptions, and further directions only. The solicitors finding the field of the Rolls now entirely clear, will carry their suits there in greater numbers than ever, and Sir John Leach, in a year or two, will be as much overburdened with business, as he was during the latter part of his Vice Chancellorship."

We have no space to enter, with Mr. Cooper, into an investigation of the evils which affect the administration of justice, by the House of Lords or the Privy Council, as courts of appeal, or by the Court of the Commissioners of Bankrupts.

The pages which are taken up with these subjects are, however, well worthy of attentive perusal, nor can we rise from them without a painful conviction that the judicature of this nation labours under the mass of business imposed upon it, and is utterly inadequate in form and power to meet the growing necessities of a great and commercial people.

We shall confine our further notice of this book to a mere statement of the remedies proposed or approved by the author, consisting of a body of suggestions not likely to be all at once, if ever, adopted, but which presented in an entire form, enables the reader to take a comprehensive view of the whole. To judge of their nature and extent, of the relation and coherency of the parts, and the operation and bearing of them upon each other—it is only in this manner that a plan of extensive reform, although it be actually adopted only by little and little, can escape the character of patchwork, or be undertaken with any prospect of ultimate success: it is like a military campaign, which though it be in fact promoted in and accomplished by gradual and daily advances, is founded upon a previous plan of the principal base of operations, the direction of attack proceeding from it, the posts to be secured, and the final object to be gained. It is only by a similar mode of proceeding that a beneficial reform in our courts of equity can ever be accomplished.

The following are the propositions alluded to:

1. That there should be another efficient judge, in addition to the Master of the Rolls and Vice Chancellor, and that the Chancellor should no longer sit in the court of Chancery to hear original causes.

2. That three courts should sit at the same time, from ten until four o'clock.

3. That the same causes should not, in their different parts or stages, be heard before different judges.

4. That the causes should be divided among the three courts, at the commencement of each sitting, in such a manner, that the causes first set down might have precedence on the different lists.

5. That the judges themselves should distribute the causes between the several courts, and should meet together, a convenient time before the sittings, for that purpose.

6. That there should be no appeal from either of the three courts, except to the court of last resort.

7. That the three courts should hold their sittings under the same roof, in some place near the Master's office.

8. That the House of Lords and Privy Council should abandon their respective jurisdiction in matters of appeal, and in their place should be erected a high tribunal of appeal, to be composed of a certain number of judges who had already presided in the tribunals of equity and common law, and of which the Lord Chancellor should be the head.

9. That the business in bankruptcy should be taken from the Court of Chancery, the commissionerships of bankrupt suppressed, and a new court of bankruptcy be created, composed of four or five barristers, with fixed salaries, who upon their appointment should become disqualified from acting as advocates, and that from this court an appeal should lie to the court of last resort.

Such are the heads of the propositions brought forward by M. Cooper; they comprise great and extensive changes; but that is a vice only when the proposed reform goes beyond the evil that wants correction. That there will be a diversity of opinion as to the expediency of many of these propositions is to be expected, but it can hardly for one moment be denied that the adoption of those which relate immediately to the court of Chancery, would go very far to correct the worst of the manifold abuses, which make that court "to stink in the nostrils of the people.

Our remarks have hitherto been confined to the evils produced by the delay in hearing causes set down for hearing; this, as we have said, is a fault solely attributable to the court itself, and can only be cured by some adequate alteration in the structure of the court, either by a denunciation of its jurisdiction, or by increasing the number of its judicial members. But although this, of all subjects of complaint, is the most aggravated and perhaps the least excusable, it would be an insult to the understandings, and a mockery of the miseries of those who either are or otherwise would be suitors in this court, to take up our resting place at this stage of reform, and to despise or wink at the mass of delay and expence generated by the intricate practice of the court, and the variety

of process by which with extraordinary labour it compasses the objects of a suit. The orders lately promulgated go in some measure to this point; nor are we ignorant that the law administered by the court is, by reason of its subtlety, its extent and uncertainty, alleged to be another and most fruitful source of evil. But the field of discussion into which these topics would lead us is too wide and important to be entered upon in the present article, and we must reserve the investigation of them to a future opportunity.

[A topic for consideration here suggests itself, which from motives of delicacy has been omitted by the writer of the article. In these we do not happen to participate, and shall therefore take the liberty of asking why Mr. Brougham was wanting to the expectations of the country, when Chancery Reform was last discussed in Parliament? On the 25th April last, Mr. M. A. Taylor moved "that it appears to this house from papers laid on the table, as well as from the report of the commissioners, that, notwithstanding the establishment of the Vice Chancellor in 1813, some further steps are still necessary to advance the general interest of suitors in equity, and enable the court of Chancery effectively to discharge the important duties depending on its jurisdiction." This motion was resisted by Mr. Brougham alleging, as the grounds of his resistance, that the courts of equity were quite equal to the business properly and strictly belonging to them, and that the appointment of an additional judge, in the case of the Vice Chancellor, had in no respect diminished the arrear whilst a bad judge presided on the woolsack, which same arrear was now rapidly diminishing beneath the exertions of a good one. We are given to understand that the unexpected desertion of so able a coadjutor has been spiritedly resented by Mr. M. A. Taylor, and that the learned members for Winchelsea and Durham are by no means on the same terms of familiarity as before. Is then the one unreasonable, or the other false? Both, alas, cannot be right; and the country is too largely indebted to them for a word or two on the occasion of their difference to be out of place here.

In the debate which took place on the 28th February, 1827, the following remarks were made by Mr. Brougham:

"Of my honourable friend, the member for Durham, I feel bound to say that he has uniformly and zealously advocated, in this house *that reformation in the court of Chancery, which is at length admitted, even by the most zealous friends of that court to be necessary.* My Hon. Friend has the honour of having originated a motion to remedy these abuses; he has also the credit of having struggled, with unabated zeal, against them from time to time; and he has now, unlike the projectors of other great reformations, the satisfaction of witnessing, that although every thing he has sought to accomplish is not yet conceded *still that the principle upon which he set out is no longer attempted to be denied in any quarter.*" A little farther on he terms the abuses in question "a mischief so enormous, that I should fatigue the House if I were, for the hundredth time, to give it the name it deserves, or the expressions extorted, whether from lawyer or layman, from suitor or only (as I am happily myself) spectator of the miseries of suitors -- a mischief, the like of which I very believe no other nation on the face of the civilized globe ever suffered

itself to be contaminated or mocked with — a mockery of what ought to be the pure administration of justice." (*The Morning Chron.*)

Now unless the reporters are wonderfully wrong both as to these passages and the whole tenor of the speech, Mr. Brougham can only justify his recent conduct by maintaining that Mr. Taylor has departed from his original principle, "the principle no longer attempted to be denied in any quarter," and that the reformation "at length admitted even by the most zealous friends of that court to be necessary," was nothing more than the dismissal of Lord Eldon. But most unluckily for this sort of defence, Mr. Taylor on that very night (the 28th February) preceded Mr. B. in the debate; maintained, as he had done repeatedly, the necessity of dividing the jurisdiction, and particularly urged the overwhelming nature of the duties of the Chancellor; and still more unluckily, Mr. Brougham himself, in the midst of the sarcasms and invectives of which his speech was principally made up, kept steadily in view the bad construction of the Court, and more than once attacked the system. It is idle, therefore, and absurd to say, that he is justified in receding from his pledge. We should be sorry to think that all his former efforts are attributable to personal hostility, and that he now draws back from an unwillingness to afford Lord Eldon the benefit of any inference the public might be inclined to draw from a plain confession of the inadequacy of the establishment. But we cannot help the suspicion. It is notorious that the delays are at this hour intolerable, that the present Chancellor is as much behind-hand as his predecessor; that more judges are imperatively called for, and that the experiment of adding to their number has never yet been fairly tried. Mr. B. himself has put one sophistry to rest. "Every man of common candour acquainted with the facts is aware that this (the number of appeals) is a groundless charge against the Vice Chancellor. If the right of appeal was direct from him to the Lords, we should see a different state of things." (28th February, 1827.) Yet on the 25th of April last he cited the self-same circumstances he formerly explained, for the purpose of strengthening the argument he was formerly the first to ridicule. Such ambi-dexterity may be useful to an advocate, but it is very far from creditable to a statesman; and we have searched in vain the recent history of legislation for any thing like a plausible apology. In deciding in Mr. Taylor's favour, therefore, we can scarce be suspected of partiality. In a former commentary on some of Mr. Brougham's suggestions, we were not lavish of applause, because we hate that fawning littleness which runs riot in the common place of adulation. We cannot keep on applying the terms "great," "talented," "enlightened," &c. &c. to a man whom all the world admits to be so. But we were not on that account unconscious of his claims, nor are we now unwilling to declare them. It may be said that his great speech was little more than a collection of superficial hints; that he skimmed over the surface of all subjects, and went to the bottom of none. It may be true, as has been eloquently urged, that "the sun illuminates the hills whilst it is still below the horizon, and truth is discovered by the highest minds only a little before it becomes manifest to the multitude. This is the extent of their superiority. They are the first to catch and reflect a light, which without their assistance, must in a short time be visible to those who lie far beneath them." Such topics of detraction affect equally the great of all times; and it is praise enough to have accelerated a national improvement; — to have struck a blow in the country which is still resounding through it; to have given depth and scope and maturity to plans, which the highest order of intellect was necessary to concentrate and which lay neglected for want of concentration. This praise is Mr. Brougham's; and it is very far from our intention to assert that the value of his services can be materially impaired by a single instance of apostacy, how gross soever it may be. We must,



however, be permitted to lament it. Though not so black as Bacon's bribery, not quite so bad as Fox's coalition, it has a point or two in common with both. It forms a blot on an illustrious name, and breaks in upon the beau ideal of a character which now, like theirs, belongs to history. "The triumph of party," said Mr. Pitt, in allusion to his rival's tergiversation, "shall never reduce me to any inconsistency which the busiest suspicion shall presume to glance at. I will never engage in political hostility without a public cause. I will never forego such hostility without the public approbation; nor will I be questioned and cast off in the face of this house, *by one virtuous and dissatisfied friend.*" Every word comes home to Mr. Brougham. He is not merely suspected, but convicted of inconsistency: he has engaged in political hostility without a public cause, or why did he stop short on the ex-Chancellor's secession? He has foregone that hostility without the public approbation; and he is questioned and cast off in the face of the house by a virtuous and dissatisfied friend. By conduct such as this (and the observation must form our apology for so long a note) public men are gradually loosening their hold upon the opinions and sympathies of the people. There is an unblushing recklessness of consistency abroad; ultras of all sorts are mixed up together, conceding principles,—exchanging parts; and it is a waste of time to calculate on character, when we find a Dawson coming forth an emancipator, and a Brougham the abettor of legal corruption.—*Edit.*]

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#### ART. XIII.—THE LIFE OF SELDEN.

IF a reputation for learning be one of the most difficult to acquire, it is certainly the most easy to retain. Men are very well disposed to take on trust the merits of the most renowned in this respect; and thus, whilst the names of Selden and others are scarce ever mentioned without some addition indicative of their vast acquirements, their works are to be found only in a few well-stored libraries slumbering beneath the accumulated dust that checks with reverential dread the approaches of the curious. "The great dictator of learning," as his contemporaries styled him, is perhaps more neglected than any of his compeers, on account of the uninteresting nature of his subjects and the terrific titles he has conferred on them. The "History of Tithes" might be important as disproving the divine right of the clergy thereunto, at a time when those opinions were general, now peculiar to Sir Harcourt Lees and Mr. Fletcher: the Titles of Honour may still instruct a herald or amuse a maiden lady of good family; but we should be at a loss to conceive how ponderous volumes of elaborate inquiry into all the antiquities of Syria and Palestine, and minute chronicles of the

traditions, customs, laws and manners of the Hebrew nation, could ever please any number of readers, unless remembering that the days are not so long gone by when it was held as important to ascertain how beards were worn or nails cut in some country, in some century A. C., as to discover the deepest truths in morals or the soundest principles in legislation. The few works of Selden, too, that bear legal titles, are purely historical, and breathe only an antiquarian spirit. The student, who is anxious to learn the opinion of so celebrated a man from his "Discourse," touching the office of Lord Chancellor in England, feels disappointed at finding under that title a mere tracing of its existence from early Saxon times until the dignities of Lord Chancellor and Lord Keeper were united by statutes in the 28th Henry III. The tracts on testaments and intestates' goods are framed on a similar principle, so that his services to future members of his profession may be summed up in his notes to Fleta, Fortescue, and Hengham. Yet Selden was a lawyer of the profoundest knowledge, and an advocate of the first ability; his speeches in parliament, and his vindication of the personal liberty of the subject, first clearly defined the bounds of royal prerogative on many points; and if, as Clarendon says, he was far more distinguished as a speaker than a writer, we may venture also to affirm, that, notwithstanding his entire devotion to literary labours, his life will be found far more instructive than his works. His biography has been undertaken by many hands, yet none seem to have clearly understood his character. He has been called by one party an infidel, a time server, a bitter foe to church and king; by the other, a profound philosopher, a willing martyr. He was none of these. His chief characteristic was moderation; his sole defect was love of ease. But Selden's nature will be easily developed by referring to the chief events of his life.

John Selden was born at Terrington, in Sussex, at the end of the year 1585. He passed the common routine of education in those times at Oxford and the Temple. Learning alone, we may safely conclude, did not procure him in early youth the illustrious friendships of Cotton, Spelman, Camden, Usher, Drayton, and old Ben, but he appears

throughout a prolonged life to have been a man of that happy moral constitution, whom to know was to admire and love. His *History of Tithes* first introduced him, at the age of 33, upon the perilous arena of public life, where a thousand symptoms told already of a fast coming and a fearful conflict. This result was probably neither expected nor desired by the author. There is an honest earnestness and mild simplicity in every page of this somewhat tedious work, that clearly indicates his object was to elicit truth rather than to provoke controversy. His after life demonstrated that he was in inmost heart a friend to the established church; and the vindictive malice of his antagonists only proves how completely that Romish spirit still prevailed in England, which recognized no difference between friend or foe when an unlicensed hand was stretched forth to strengthen or to shake the fabric of ecclesiastical dominion. That Selden recanted and made submission for his offensive publication before the high commissioners is certainly on record, but his repentance was expressed rather for publishing than holding such opinions; and we may in common charity believe that so gentle and amiable a person was grieved in very truth at having awakened so much ill-feeling in those critical times. Who can doubt the pure intentions of the writer, who reads the following extract from his preface, where he seems for a moment to escape from the trammels his idolatrous veneration for antiquity had cast around him, to catch a glimpse of the real and essential truth beyond the mists of prejudice and time, and to kindle with a more sound and profitable philosophy than he could gather from his Rabbins or his Eutychius. After contending for the right of the laity to give opinions on church matters, he goes on.

“ If it be clear then, as I hope none hath the impudence to deny it, that neither the divine nor civilian nor canonist by the course of their own approreed studies can come to what is necessary in the knowledge of the ‘*History of Tithes*,’ it will be as clear that none of them could challenge the meddling with it as a right especially belonging to any of their profession. But neither, indeed, is it proper to any one alone of those that are most commonly made professions. The

truth is, both it and not a few other inquiries of subjects too much unknown, fall only under a far more general study; that is, of true philology, the only fit wife that could be found for the most learned of the gods. She being well attended in her *ἐγκύκλια διακονήματα* or daily services of enquiry by her two handmaids, curious diligence and watchful industry, discovers to us often from her raised tower of judgment many hidden truths that on the level of any one restrained profession can never be discerned. And every profession takes from her to itself, as was long since observed, some necessary part not elsewhere to be sought for, not much otherwise than as the subaltern sciences do from their superiors, or as they all do from that universality or first philosophy which is but the more real part of true philology and establishes principles to every faculty that could not of itself alone know how to get them." v. 3. p. 1073. Ed. 1726. If philology, a term often applied to researches of little use into idioms and forms of construction, be here received in the extended sense the author means it, the ideas conveyed in this passage are still finer than the language that clothes them.

A dispute about a herring fishery first introduced Selden to the notice of king James I. He himself modestly attributes the favourable reception he experienced to the influence of the all powerful Buckingham, with whom Jonson had interceded in his behalf. But James was probably annoyed so much by the publication of the *Mare Liberum* of Grotius to vindicate the right of the Dutch and other nations to use the sea round Britain, that on hearing Selden had in part prepared a reply, he was willing to overlook his delinquencies on the tithe question, although he forbade peremptorily any further contention on the subject with Mountague, then engaged in confuting the 'History.' "*Quod confutationis futuræ puto non exiguæ per se confutationis instar fuit,*" says Selden with some triumph, in his *Vindiciæ*. The *Mare Clausum*, such was the title of the vindication of our maritime dominion, was not, however, published for some years. It is characteristic of the meanness and weakness of James, that he took the author with him to his closet with the design of affixing his imprimatur to the work, when he paused suddenly, "remembering," as he said, "that some things were

therein spoken of the North Sea, which might, perhaps, displease his brother the King of Denmark, which he should be unwilling to do just now, when he already owed him a power of money and was shortly about to beg the loan of more."

In 1621 Selden was employed by the commons, though not yet a member of that house, to draw up the famous protestation in favour of their liberties and privileges. For this offence he was imprisoned by the king. This short duration of five weeks would scarcely deserve notice, were it not that a letter still exists, sent in his excuse to Buckingham by Archbishop Williams, wherein the writer speaks of an inclosure, in Selden's hand, disavowing any approbation of that power and judicature lately usurped by the commons. Much outcry has been raised at this apparent tergiversation and poltroonery, but it must be remembered that he had drawn up the protestation as a hired advocate only, that he had not then intermeddled with political disputes, and may at least be supposed at that time to have adopted no decided opinions on the state of public affairs. When his attention was once turned to these matters, we shall see how resolutely he adopted the cause of the people. His quiet neutrality during the session that he sat in parliament for Lancaster, at once evinces his love of ease, and his then undecided state of feeling.

But the time at length came for his displaying to an admiring nation qualities hitherto concealed. The zealous patriotism that distinguished all his actions in the first parliaments of Charles the First, and the undaunted resolution that he manifested beneath the royal displeasure, must ensure him the gratitude and admiration of all ages. In 1627 he defended in the most able and conclusive argument the cause of Sir Edward Hampden, one of the gentlemen imprisoned for refusing to submit to the imposition of forced loans. In 1628 he was employed by parliament to search their records previous to drawing up their four resolutions respecting the freedom of the person, and the necessity of their co-operation for imposing taxes on the subject. On the dissolution of 1629, he shared the imprisonment of those members whom the rash and most unfortunate Charles esteemed most seditious and refractory. Selden's conduct on this occasion marks it as the

most brilliant epoch of his life. Inspired by the magnitude of the occasion, he seems for a time to have cast off his habitual love of ease, and by his dignified yet powerful remonstrances he confounded argument and silenced insolence, whilst, in refusing to accept of bail or to make any humiliating submissions to the judges whom he deemed unjust, he carried the spirit of uncompromising heroism even farther than any of his fellow-sufferers. The cause of his final release after three years' imprisonment is most curious. It was effected by the Earls of Arundel and Pembroke, who, being involved in a dispute about the title to an enormous property, thought no other man in England capable of managing their cause. With his habitual love of literary labour, he had availed himself of the time spent in bondage to complete some of his most elaborate works.

Thus far the co-operation of Selden in deed and spirit with the cause of the people had been entire and unflinching, but the moderation and prudence of his character began to operate most powerfully, when he discerned the omnipotence of the parliament, and their intention to profit by it to the uttermost. He was not gifted with that far-seeing and untaught philosophy which might have revealed to him amid the terrors of an approaching civil war the magnitude of the ultimate good that posterity must derive from the contest, but as a shrewd and well judging man he perceived that a revolution must take place, that the foundations of government must be subverted, and he perhaps anticipated that a worse and more despotic system would arise from the ruins of the present. The lover of ease and order was of necessity averse to tumult; the temperate and benevolent politician thought that certain misery in fact was too dear a price to pay for an uncertain good in prospect. His hatred too of bigotry and puritanism, of which his *Table Talk* affords ample proof, had, perhaps, great influence on his conduct, when he saw how thoroughly the cause he had adopted was tainted with religious intolerance. In all this his head may have judged wrongly, but his heart was right. Selden might lag behind, but he did not desert his party; he might wish to prevent the downfall of royalty, but he accepted no favours from the court. He dedicated some learned works to Laud, because the archbishop

was a patron of learning; he assisted in 1633 in getting up a masque for the entertainment of the court, because he loved the stage and loathed the sentiments of Prynne's *Histriomastix*; but he was still an inflexible and uncorrupted patriot.

The strongest act of Selden in opposition to the popular party was his vote against the attainder of Lord Strafford. That he should have sought to stay the punishment of that bold bad man may at first appear extraordinary. Mr. Godwin, in recording this vote, observes, with no very great liberality, "Such after all is the best of lawyers." We will go farther than the philosophic author of the *History of the Commonwealth*, and venture to affirm that Selden's conduct proceeded from what is generally complained of as the worst fault of lawyers — a high estimation of the value of precedent. But did he not vote rightly and most wisely? Strafford was a dangerous man, but he was arraigned under Edward the Third's famous Statute of Treasons, and he had committed no act that came within that statute; he was therefore arraigned unjustly. "But," say the pleaders for his punishment, "his death was necessary, for his energy and wisdom might have ensured the triumph of the royal party." A strange opinion, as it seems to us, that the genius of any single individual can long check a revolution of which a people have and feel they have a need. But grant it for a moment true, and admit that utility, not justice, should be the regulator of political conduct; it may yet be doubted whether the example of a House of Commons forcing the statutes to bear what interpretation might best suit them, in order to punish an obnoxious individual, was not fraught with more danger to the cause of liberty and happiness, than the suffering Strafford to exist. The house itself was well aware how frightful a precedent they had introduced by this act of attainder. They in consequence inserted a proviso, that "no judge or other magistrate should adjudge any thing to be treason in any other manner than they would have adjudged if this act had never been made" — an admirable scheme, teaching future parliaments how to steal the steed, and lock the stable door in the same moment. Mr. Godwin nevertheless would seem to think that this proviso

neutralized all the dangers of the act. Yet only four years afterwards, Laud, in the extremity of age and weakness, was dragged forth to public execution under a similar bill, with a similar proviso tacked to it. Encouraged by the specimen of a secure method for quelling an enemy, the Commons now employed it to remove a powerless and imbecile old man, who, even granting him to have been (as some writers assert) a wretched compound of superstition, vanity and cruelty, should have been left like a fangless bloodhound to linger out the trifling remnant of his days, unregarded or despised.

From the commencement of the revolution until his death the conduct of Selden was distinguished alike by moderation and integrity. It is remarkable that in 1642 he was esteemed to be so well affected toward the court then held at York, that Charles had thought of offering him the great seal, but was advised that there was no chance of his accepting it. Perhaps the motives of his refusal would have been no better than Clarendon suggests. "He was in years," says that historian, "and of a tender constitution; he had for many years enjoyed his ease which he loved: he was rich, and would not have made a journey to York, or have lain out of his bed for any preferment, which he had never affected." It is indeed much to be feared that his constitutional indolence did in those times too much limit his exertions; and we find that his good deeds were confined to redeeming the library of his friend Usher, or recovering the Arabic lectureship for Pococke, in times when the weight of his character and the vigour of his eloquence might have gone far to moderate the extravagancies or turn to best account the successes of the victorious party. The parliament, however, though he was too rich to need, and too disinterested to solicit remuneration, thought the name of Selden worthy to be numbered among those who in the year 1647 received large sums in reward of their past services. From this time he took little part in public life. Luckily for mankind he declined to answer the Icon Basilike, though requested by Cromwell to do so, and thus left it to the handling of a far mightier genius. His death did not take place until the mature age of 70, in the house of Elizabeth, countess of Kent, to whom many supposed that he was united in



stricter bonds than those of friendship. His expressions on his death-bed of deep conviction of his own sinfulness and humble confidence in the atonement of Christ must utterly confute Hume and others, who have dared, without a shadow of proof, to stigmatize his name with infidelity. Perhaps Clarendon's short character was no exaggeration, "that he was a person whom no character can flatter or transmit in any expressions equal to his merit and virtue;" but his memory was too great for his judgment, and his love of ease still stronger than his love of liberty. His works are nearly all too dull to open, unless for purposes of reference, with the exception of his Table-talk, from which we have ventured to cull the choicest apothegms for the entertainment of the reader.

" *Bible.*

" *Scrutamini scripturas.* These two words have undone the world. Because Christ spoke them to his disciples, therefore we must all, men, women, and children, read and interpret the scripture." v. iii. p. 2009.

Henry 8th made a law that all men might read the scriptures except servants, but no women, except ladies and gentlewomen, who had leisure and might ask somebody the meaning." p. 2010.

" *Bishops.*

" The bishops being put out of the house, where will they lay the fault now. When the dog is beat out of the room, where will they lay the stink." p. 2014.

" *Books.*

" The giving a bookseller the price of his books has this advantage. He that will do so shall have the refusal of whatsoever comes to his hand, and so by that means get many things, which otherwise he never should have seen." p. 2015.

" *Ceremony.*

Of all people ladies have no reason to cry down ceremony, for they take themselves slighted without it. And were

they not used with ceremony, with complements and addresses, with legs and kissing of hands, they were the pitifullest creatures in the world. But yet methinks to kiss their hands after their lips as some do is like little boys that after they eat the apple fall to the paring from the love they have to the apple." p. 2017.

*" Damnation.*

" To preach long, loud, and damnation is the way to be cried up. We love a man that damns us, and we run after him to save us. If a man had a sore leg, and he should go to an honest, judicious surgeon, and he should only bid him to keep it warm and anoint with such an oil (an oil well known) that would do the cure, haply he would not much regard him, because he knows the medicine beforehand an ordinary medicine. But if he should go to a surgeon that should tell him, Your leg will gangreen within three days, and it must be cut off, and you will die unless you do something that I could tell you, what listening there would be to this man. Oh, for the Lord's sake tell me what this is, and I will give you any content for your pains." p. 2025.

*" King.*

" The king's calling his friends from the parliament because he had use of them at Oxford, is as if a man should have use of a little piece of wood, and he runs down into the cellar and takes the spigot, in the mean time all the beer runs about the house." p. 2039.

*" Libels.*

" Though some make light of libels, yet you may see by them how the wind sets. As take a straw and throw it up in the air, you shall see by that which way the wind is, which you shall not see by casting up a stone. More solid things do not shew the complexion of the times so much so ballads and libels. p. 2042.

*" Marriage.*

" Marriage is a desperate thing. The frogs of Esop were extream wise, they had a great mind to some water, but they

they would not leap into the well, because they could not get out again." p. 2044.

*" Peace.*

" King James was pictured going easily down a pair of stairs, and upon every step there was written, *peace, peace, peace.* The wisest way for men in these times is to say nothing." p. 2052.

*" Power.*

" They that govern most make least noise. You see when they row a barge, they that do drudgery work slash, and puff, and sweat, but he that governs sits quietly at the stern and scarce is seen to stir." p. 2057.

*" Predestination.*

" They that talk nothing but predestination, and will not proceed in the way of heaven till they be satisfied on that point, do as a man that would not come to London, unless at his first step he might set his foot on the top of Paul's." p. 2062.

*" Wife.*

" 'Tis reason a man that will have a wife should be at the charge of her trinkets and pay all the scores she sets on him. He that will keep a monkey should pay for the glass he breaks." p. 2028.

*" Wisdom.*

" Wise men say nothing in dangerous times. The lion you know called the sheep to ask her if his breath smelt. She said, Aye. He bit off her head for a fool. He called the wolf and asked him : he said, No. He tore him in pieces for a flatterer. At last he called the fox, and asked him : Truly he had got a cold, and could not smell.' " p. 2078.

*" Words.*

" Words must be fitted to a man's mouth. It was well said of the fellow that was to make a speech for my lord-mayor, he desired to take measure of his lordship's mouth."

## DIGEST OF CASES.

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In our first Number, we experienced some difficulty in keeping the Real Property Division of the Digest distinct. We have therefore omitted it in the present Number, and real property cases are ranged under the general heads of Common Law and Equity.

The Common Law Digest below comprises the two last numbers of Barnewall and Cresswell's; the two last numbers of Bingham's; and the last number of Moore and Payne's, Reports. Our work therefore now includes all the reported cases decided in the King's Bench and Common Pleas, since the beginning of Michaelmas Term, 1827.

The Equity Division comprises the last numbers of Russell's, Simon's, Younge and Jervis' Reports, and the last number of Dow's Parl. Cases.

No Bankruptcy Reports have appeared since the publication of our first Number; neither have Manning and Ryland published a fresh number of their Reports.

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## COMMON LAW.

### ACCOUNT STATED.

In an action by the assignees of a bankrupt, evidence that the defendant on his examination before the commissioners admitted the receipt of a sum of money on account of the bankrupt, will not support a count on an account stated with the assignees as such. And, per Littledale J., a disclosure by compulsion can never be considered as an accounting. — *Tucker v. Barrow*, 7 B. & C. 623.

### ACT OF PARLIAMENT.

1. A private act empowering a company to break up the soil and pavement of roads, highways, footways, &c. with a proviso that they should not enter private property without the consent of the owner, does not authorize them to dig up the soil in the field of an individual, through which there was a public footway, without his consent; the liberty given applying merely to footways where there is no private owner of the soil. — *Scales v. Pickering*, 4 Bing. 448. S. C. 1 M. & P. 195.
2. An act establishing a canal company limited their profits to 8 per cent. and directed that, in order to compute the profits, an annual account of the charges and expenses of maintaining and using the canal should be made up and laid before the justices at quarter sessions

who were authorised to reduce the rates when the profits exceeded 8 per cent. The company after the completion of the canal expended a sum of money in widening and deepening a particular part of it which the justices refused to allow ; but the court held that as, from the words of the act, the improvement of the canal was evidently in the contemplation of the legislature, and the deepening and widening afforded new facilities for using it, the expenses of the alteration were to be considered as expenses of using ; and a *certiorari* issued accordingly to remove the order made by the quarter sessions for expunging the item. — *Rex v. Justices of Glamorganshire*, 7 B. & C. 722.

3. In construing an act of parliament the language of the whole act is to be attended to, and the meaning of the legislature collected from it. Thus where a lease made under the authority of an act of parliament contained a proviso for re-entry in case the lessee should neglect to bring a certain quantity of coals to C. and sell them at a certain price ; and a subsequent act enacted that the lessee might sell his coals brought to and deposited at C. *or at any other place near thereto to be used as a repository for coals instead thereof* at a certain increased price ; Held, that though the last act did not expressly authorise the lessee to change the place, the intention of the legislature so to authorise him was clear and no forfeiture was incurred by changing it. It was also decided, that where a lease is granted under an act of parliament which provides for the re-entry of the lessor, it is unnecessary to introduce into the lease a clause of re-entry in the same event ; and that if it is the intention of the legislature to control the lease, a proviso therein for re-entry, not corresponding with that in the act, is void. — *Doe dem. Bywater v. Brandling*, 7 B. & C. 643.
4. In an action to recover a bill of costs for soliciting an act, whereby it was directed that the costs should be paid out of the tolls ; Held, that no action lay against the commissioners appointed under the act, unless it could be shown that tolls had been collected to the amount of the demand. — *Andrews v. Dally*, 4 Bing. 566.

#### ADMINISTRATOR.

An action at law cannot be maintained for a distributive share of an intestate's property either against the administrator, or against the executor of the administrator, although he has expressly promised to pay, there being no consideration to support such promise. — *Jones v. Tanner*, 7 B. & C. 542.

#### AFFIDAVIT.

An affidavit of the caption of a fine taken before a British consul abroad is insufficient. — *Ex-parte Lady Hutchinson*, 4 Bing. 606.

And see PRACTICE, 7. 13. 16.

#### AMENDMENT.

A general verdict in a cause commenced in the C. P. was given for the plaintiff, the declaration containing several counts and the evidence applying to all. Some of the counts being bad in law, error was

brought in the K. B. and the judgment reversed. The court of C. P. after argument in error, amended the *postea*, and, after the reversal, amended the judgment roll remaining in that court by the amended *postea*. The question for the court was, whether they were bound to amend the record by the amended record of the C. P. and per Bailey J. "There being a difference of opinion, we think it right to state the facts upon the record, that a court of error may consider whether the amendment we have ordered ought to be made or not. I forbear giving any opinion." — *Mellish v. Richardson*, 7 B. & C. 819.

#### ANNUITY.

Where the grantor of an annuity becomes bankrupt, the value of the annuity must be ascertained by commissioners before a surety can be sued for the arrears by the grantee, although the annuity was granted and the bankruptcy took place previously to the 1st Sept. 1825, (the time when the present bankrupt act took effect.) — *Bell v. Bilton*, 4 Bing. 615.

APOTHECARY. See SURGEON.

APPEAL. See FOOTWAY; MANDAMUS.

#### ATTORNEY.

1. The business of an attorney is a profession, not a trade; and a person who serves under articles of clerkship, is not an apprentice within the popular meaning of that term. Therefore where by custom all persons who had served a seven years' apprenticeship there were entitled to be admitted free burgesses of a corporate town, held that service with an attorney was not within the custom. — *The King v. Corp. of Doncaster*, 7 B. & C. 630.
2. An attorney suing as a common person (by *latitat*) loses the privilege of retaining the venue in Middlesex. The venue having been changed on the common affidavit, a rule for bringing it back was therefore discharged. — *Mounsey v. Watson*, 7 B. & C. 683.
3. An attorney's authority ends on signing final judgment. Thus, where a party in custody for a judgment debt was brought up to be discharged under the Lords' act. Held, that the attorney who had conducted the cause could not sign the note of allowance on behalf of the detaining creditor without a special power of attorney. — *Macbeath v. Ellis*, 4 Bing. 578.

And see PRACTICE, 15.

#### BAIL.

Bail are not rendered inadmissible by becoming so at the request of the defendant's attorney, unless indemnified by him. — *Hunt v. Blaquiere*, 4 Bing. 588.

And see PRACTICE, 14; ERROR.

#### BANKRUPT.

1. The goods of a bankrupt were seized on the same day on which he obtained his certificate, but the priority did not appear. The defendant

- paid the debt and costs into court under a judge's order, and moved the court. The court refused to relieve on motion, and it was doubted whether an *auditi querelâ* would lie, and whether the goods of the bankrupt were protected as well as his person, by 6 Geo. 4. c. 16. s. 121. — *Hanson v. Blakey*, 4 Bing. 493. S. C. 1 M. & P. 261.
2. A bill of sale given voluntarily to a debtor, by a trader who knew himself to be in such a situation as that a bankruptcy would in all human probability follow, is an act of bankruptcy, and in such a case it is properly left to the jury to say whether the giving the bill of sale was a voluntary act and done in contemplation of bankruptcy. — *Gibbins v. Phillips*, 7 B. & C. 529.
  3. The commissioners have no authority to commit a witness for not giving a satisfactory answer to an immaterial question, though the witness was evidently unwilling to make a full disclosure. He was asked what he *believed* the intention of the bankrupt to be in coming to his (the witness's) house on a particular occasion; to which the witness replied, "that he did not know what to say," and would give no other answer. — *Ex-parte Baxter*, 7 B. & C. 673.
  4. A commission, issued before a former commission against the same party has been disposed of, is void; and a bankrupt is not entitled to his discharge on the ground that he had obtained his certificate under such second commission, although issued against him after the debt for which he was arrested had been incurred. — *Till v. Wilson*, 7 B. & C. 684.
  5. A sheriff taking goods in execution after an act of bankruptcy but before a commission issued, and without notice of the bankruptcy, is liable in trover. Semble that he is not liable in trespass. — *Price v. Hellyar*, 4 Bing. 597.
  6. By 6 Geo. 4. c. 16. s. 8. it is enacted, that, if any trader shall after a docket struck against him pay to the person or persons who struck the same, money, or give any satisfaction or security to such person by way of preference, any commission issued upon such docket shall be supersedable at the discretion of the chancellor, and the party receiving the same shall forfeit his debt and be liable to refund. In an action by the assignees under a second commission for goods delivered under the circumstances contemplated by the section; Held, that an affidavit made by the defendant for the purpose of suing out the former commission, and stating the bankruptcy, was as against him sufficient proof of the bankruptcy. — *Ledbetter v. Salt*, 4 Bing. 623.

And see ACCOUNT STATED. COSTS; ANNUITY.

#### BILL OF EXCHANGE.

1. Bills given for the price of goods to the vendor, negotiated by him, but subsequently returned and remaining in his hands unsatisfied, will not prevent the vendor from recovering on a count for goods sold. — *Burden v. Halton*, 4 Bing. 454. S. C. 1 M. & P. 223.

2. K. and Co. were the bankers of A. and held securities for any balance that might become due from him to them for cash advanced, or on bills drawn, indorsed, or accepted, by him. K. and Co. received from a customer bills drawn by E. H. and Co. upon, and accepted by A. A. became bankrupt, and E. H. and Co. entered into a deed of composition with their creditors to which the assignees of A. and K. and Co. were parties. The deed recited that the provisions proposed should be accepted by the creditors of E. H. and Co. in full satisfaction, as well against them as against the estate of A. in respect of the bills of exchange on which E. H. and Co. and A. were liable. By a clause in the deed all such bills were to be delivered up to trustees, and K. and Co. delivered them accordingly; but afterwards received them back and held them when the action was brought. The action was by the assignees of A. to recover such balance of the proceeds of the securities deposited by A. with K. and Co. which remained after paying other demands of K. and Co. exclusive of those arising upon the bills in question. But the court held, that notwithstanding the deed, K. and Co. were entitled to retain the balance; on the ground that the liability of A. upon the bills was not discharged by the deed. — *Maltby v. Carstairs*, 7 B. C. 735.
3. It seems that there must be a trading partnership, or an express authority, to authorise a party to bind another by accepting bills drawn for a debt due from both. Thus where two persons entered into an agreement with a third for the price of crops and stock upon a farm in which the two were jointly interested; and it was stipulated by the agreement that the price should be paid part in cash and part by bills at certain dates; and one of them, on behalf of both, accepted bills not drawn according to the terms of the agreement: Held, that the other, having, on hearing of the acceptance, objected to it, was not bound thereby. — *Greenislade v. Dower*, 7 B. & C. 636.
4. A bill of exchange became due and was dishonoured on Saturday. The post to the place of residence of the drawer went out at half past nine in the morning. Held, that a letter sent by the Tuesday morning post was good notice, the holder being entitled to the whole of Monday to write it; but the plaintiff's clerk having merely sworn that he had copied the letter and that it was sent, and not stating by whom it was put in the post, the evidence was held insufficient. — *Hawkes v. Salter*, 4 Bing. 715.
5. The holder does not discharge the drawer by giving time to the acceptor, unless during the time given the right to sue is suspended. Thus, where, in consideration of a promise not in writing by the executor of the acceptor, to pay the amount out of his private funds, the holder promised not to sue: Held, that the promise of the executor not being in writing was void, and that there was no consideration for the promise by the plaintiff to give time; and the right to sue not being suspended, the drawer was not discharged, although time was actually given. — *Philpot v. Briant*, 4 Bing. 717.



**BONA NOTABILIA.**

An act for making a navigable canal provided that the shares should be personal property, and by a subsequent act it was provided, that the company should nominate a clerk and keep accounts, &c. No place was named in the act, but the transfers were made and the office kept at Birmingham. Held, that the right to a share was to be considered as locally situate there for the purpose of probate, and the court granted a *mandamus* to compel the company to register a probate obtained of the consistorial court of Litchfield and Coventry, and to acknowledge the executor as proprietor of the share of the deceased. — *Ex-parte Horne*, 7 B. & C. 632.

**CANAL.** See ACT OF PARLIAMENT, 2.

**CARRIER.**

In an action for an injury to goods by negligence, it was proved that the captain of the steam vessel, in which the goods were to be conveyed, had, as was usual, pumped the water into the boiler the night before starting, and, it being winter, the pipe was cracked by the cold, and the water escaping had caused the injury complained of. The jury having found that it was negligence in the captain to have the pipe exposed without any precaution to prevent the action of the cold upon it, and that the accident could not be looked upon as the act of God, the court refused to disturb the verdict. — *Sjordet v. Hall*, 4 Bing. 607.

**CERTIFICATE.** See SETTLEMENT, 4.

**CHARTER.** See CORPORATION.

**CHARTER PARTY.**

A party in whose hands a cargo is placed by the consignees, and who agrees in writing, to put himself in every respect in the place of the charterer, is liable to the owner for demurrage at the rate specified in the charter party; and a letter in which such party, after mentioning that the ship had been placed in his hands for sale, engages to stand in the place of the charterer, is sufficient to satisfy the statute of frauds. — *Benson v. Hippins*, 4 Bing. 455. S. C. 1 M. & P. 246.

**CHURCHWARDEN.** See SETTLEMENT, 4.

**COMMITMENT.**

A commitment under the 39 & 40 Geo. 3. c. 94. s. 3. merely following the words of the statute, and stating that the party committed had been discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing a crime, (that is to say), an assault and breach of the peace, for which if committed he would be liable to be indicted, and ordering him into custody as a dangerous person, suspected to be insane, was held sufficient, without naming the person against whom the assault was meditated: for it is not to be construed strictly as a warrant of execution. — *The King v. Gourlay*, 7 B. & C. 669.

And see BANKRUPT, 3.

## CONTRACT.

1. In an action of *assumpsit* for not fulfilling a contract to take a house, the following points were decided. 1. That where an offer is made, and a certain time allowed for a definitive answer, the party making it may retract at any time before the offer is accepted, for one party cannot be bound without the other. 2. That the offer being to take upon certain terms, "possession to be given on or before the 25th July;" an intimation from the other party, that he agreed to the terms, and would give possession on the 1st August does not amount to an acceptance on account of the difference as to the time. 3. That where the declaration stated the vendor to be entitled to a term of 32 years under a contract with A.; and the vendor, in fact, had only a term of 12 years in the premises, and had merely entered into a verbal contract with A. for a further term, the variance was fatal. — *Routledge v. Grant*, 4 Bing. 653.
2. A party engaging to procure a policy of insurance on goods, with names to the satisfaction of the persons insured, such person paying the premium, is entitled to recover the premium though the insurance was effected without certifying the names of the insurers to the insured, and although the ship as well as the goods were included in the policy; the insured not objecting to the insurers, and the voyage having been completed in safety. — *Dixon v. Horill*, 4 Bing. 665.

## COPYRIGHT ACT.

A part of a work published separately and before the completion of the whole, is not demandable by the public bodies mentioned in the 54 Geo. 3. c. 156. s. 2. the words of the act being "the whole of every book and every volume thereof." — *British Museum v. Payne*, 4 Bing. 540. (In the Exchequer Chamber.)

## CORPORATION.

1. The company of tobacco-pipe makers was incorporated by a charter of Charles II., authorising them to elect wardens, &c. and to make bye-laws for the government of the society, and every person using the trade in England and Wales. Held, 1. That though incompetent to bind all persons in the kingdom, the company might make bye-laws to bind its own members. 2. That the charter, by fixing the place of meeting at London or Westminster, or within three miles thereof, sufficiently established local limits for the corporation. 3. That a bye-law imposing a fine on officers of the society for not attending was valid. 4. That a bye-law imposing a fine, on any person chosen warden, and refusing the office, was good, and that the words any person were to be understood as applicable merely to any person eligible by the terms of the charter. 5. That a bye-law, requiring certain quarterly payments from every freeman, was invalid; it not appearing that the tax was called for by the necessities of the company. — *Company of Tobacco Pipe Makers v. Woodraffe*, 7 B. & C. 838.

2. There is no settled mode of accepting a charter ; and where the majority of those to whom a charter was addressed had signed a written declaration of assent to it, this was held sufficient. A corporate meeting is not necessary. The stat. 9 Anne c. 20. s. 8. does not prevent the king from appointing to the office of mayor, under a new charter, a person who had filled the office for the preceding year under the old charter. It seems that the misconduct of the corporation in not keeping up an efficient governing body by election, in case of vacancy, is a good ground of dissolution by *quo warranto*. — *Rex v. Hughes*, 7 B. & C. 708.

And see PLEADING, 8.

### COSTS.

The costs of a cause do not constitute a debt till judgment is signed. Therefore where the plaintiff was nonsuited before, but judgment was not signed till after his bankruptcy, the court held, that the defendant's costs were not proveable, and therefore not barred by the certificate. — *Haswell v. Thorogood*, 7 B. & C. 705.

And see PRACTICE, 11. 15. ACT OF PARLIAMENT, 4. ;

### COVENANT.

1. In a lease containing a stipulation for the payment of a net annual rent, a covenant to pay land-tax and sewer's-rate is to be considered a *common and usual* covenant ; and a proviso contained in six leases out of ten of the same description of property, is also to be deemed *common and usual*. Thus, a party having entered into an agreement for the purchase of the lease of a public house described in the agreement, as held by the plaintiff at a certain net annual rent under *common and usual covenants* ; Held, in an action against the purchaser for refusing to complete his contract on the ground that the lease did not correspond with the description, that a lease containing a covenant to pay the land tax, sewers-rate, and all taxes, besides the rent specified, and a proviso for re-entry by the landlord, if any business but that of a victualler should be carried on in the house, was within the description, it being proved that a similar proviso was contained in six leases of public houses out of ten. — *Bennet v. Wonach*, 7 B. & C. 627.

And see PLEADING, 9.

DISCONTINUANCE. See PRACTICE, 9.

DISTRESS. See JOINT-TENANT.

### EJECTMENT.

The plaintiff declared amongst other things, for twenty tenements, which was assigned for error in the K. B. it being objected that the word *tenement* included things incorporate. On the cause coming on for argument, the court of K. B. directed an application to the C. P. who

allowed the record to be amended by striking out the words "*twenty tenements*." — *Doe v. Dyball*, 1 M. & P. 330.

### ERROR.

Bail in error under 6 Geo. 4. c. 96. are required, although the error is manifest on the record, if merely an objection of form. The error intended to be assigned was the want of an original writ. — *Wadsworth v. Gibson*, 4 Bing. 572.

### ESCAPE.

The officer to whom process is directed is liable for his prisoner, though placed by him under the charge of a licensed keeper of a lock-up house who suffers the prisoner to go at large. Nor does it constitute a defence to an action for an escape, that the party arrested appeared and tendered sufficient bail for himself, the practice of the mayor's court in which he was sued being that bail, if put in, must be put in for all the defendants, or none; for *per Cur.* it was the duty of the officer, on bail being rejected, to have taken the party back to the lock-up house instead of permitting him to go at large. — *De Vaux v. Sewell*, 1 M. & P. 216.

### EVIDENCE.

1. A judgment must be proved by an examined copy of the record. Thus, in an action against an attorney for negligently suffering judgment by default to be signed against his client, on which final judgment was signed and execution issued: Held, that proof of the entry of the judgment by default in the prothonotary's book, and of the inquisition by the prothonotary's allocatur, were not sufficient evidence of the judgments. — *Godefroy v. Jay*, 1 M. & P. 236.
2. In an action on the case for an injury sustained from being knocked down by a horse rode by A., it was proved that, when the accident happened, A. was going on the defendant's business, that the horse was taken from a stable which was jointly occupied by the defendant and another, and that the defendant had refused to tell to whom the horse belonged. Held, sufficient to warrant the jury in giving a verdict against the defendant, and a new trial was refused. — *Goodman v. Kennell*, 1 M. & P. 241.
3. In an action against the sheriff for a wrongful seizure, it is sufficient to prove the warrant issued by the under-sheriff, under the sheriff's seal of office, and the writ of execution need not be proved. — *Gibbins v. Phillips*, 7 B. & C. 536. note.
4. In a settlement case, the appellant's counsel being about to show upon the cross-examination of the pauper, that he had acquired a settlement by renting and occupying a tenement, it was objected that, the contract for the tenement being in writing, parol testimony was not admissible. The quarter sessions admitted the objection, but the court of K. B. overruled their decision; holding, that the fact of tenancy and the value of the tenement might be proved by parol. — *The King v. Inhabitants of Kingston*, 7 B. & C. 611.

5. The pauper proved that he had been bound by an indenture of apprenticeship, and served under it for the whole term; and that when his apprenticeship expired, he asked his master for the indenture, who said, that it was with the overseers of L. The parish officers proved, that the indenture could not be found. Held, that proof of the declaration of the master, though at the time a rated inhabitant of the appellant parish, was inadmissible, as he might have been called; and that parol evidence of the indenture could not be received.—*The King v. Inhabitants of Denio*, 7 B. & C. 625.
6. The plaintiff and defendant had agreed by parol to abide by the terms of a lease granted by the plaintiff to a third person. Held, that this lease not being stamped, could not be read in evidence in the present action.—*Turner v. Power*, 7 B. & C. 625.
7. The issue being, whether a certain messuage was situate within a chapelry, a person occupying rateable property within the chapelry is competent to prove the affirmative. It was held, that the case was within the 59 Geo. 3. c. 70. and that, no evidence being given as to the liabilities and rights of the inhabitants of the chapelry, the decision must have been the same at common law, as the objecting party is bound to shew an interest in the witness objected to.—*Marsden v. Stangfield*, 7 B. & C. 815.
8. A woman is competent to give evidence for a man with whom she is cohabiting, though passing by his name and held out to the world as his wife.<sup>1</sup>—*Bathews v. Galindo*, 4 Bing. 610.
9. In trover for a barge, plaintiff claimed under A. and defendants, who were partners, under B. who was alleged to have purchased it of A. Held, that A. was rendered a competent witness for the defendants by a release from B. alone.—*Radburn v. Morris*, 4 Bing. 649. And see PRACTICE, 5, 6; ACCOUNT STATED; INSPECTION.

EXECUTOR.—See ADMINISTRATOR; LEGACY.

#### FOOTWAY.

A person appealing against an order for stopping up a footway, must state in his notice of appeal, that he is aggrieved, although the local act giving the appeal merely requires a notice in writing.—*The King v. Justices of Yorkshire*, 7 B. & C. 678. But a notice of appeal against overseers' accounts need not state that the party giving it was a rated inhabitant or a party aggrieved.—*The King v. Justices of Somersetshire*, 7 B. & C. 581. note. In the former case, the act gave the right of appeal expressly and exclusively to the party aggrieved, in the latter to the party aggrieved or to any person having a material objection, &c.

#### INSPECTION.

In an action against the Marshall for the escape of a prisoner who had been committed to his custody by a writ of habeas corpus, the

<sup>1</sup> This is contrary to the former law upon the point. See Phill. Ev. 82.

Court granted a rule for the plaintiff's attorney to take a copy of the writ and the return indorsed. *Fox v. Jones*, 7 B. & C. 732.

## INSURANCE.

1. If a ship has been once necessarily abandoned, the owners may recover for a total loss, though she is afterwards recovered and brought into port. *Holdsworth v. Wise*, 7 B. & C. 791.
2. Underwriters are responsible for the misconduct or negligence of the captain and crew; but the owner, as a condition precedent, is bound to provide a crew of competent skill. *Shore v. Bentall*, 7 B. & C. 798. note (b).
3. A policy dispensing with all proof of interest is within the act 19 Geo. 2. c. 37. s. 1. which forbids assurances "interest or no interest, or without further proof of interest than the policy," and void. If the words of the policy do not dispense with proof of interest, but merely fix the amount, it is a valued policy, and good. In the present case the policy, after stating that the goods should be valued at so much, contained the words "*That policy to be deemed sufficient proof of interest,*" and was therefore held to be in effect an insurance interest or no interest. — *Murphy v. Bell*, 4 Bing. 567.

## JOINT TENANT.

One joint tenant may distrain for rent and appoint a bailiff for that purpose without the assent of the others. Semble that he could not do so after an express dissent by a co-tenant; but held that a mere refusal to authorize the distress did not amount to a dissent.—*Robinson v. Hofman*, 4 Bing. 562.

JUDGMENT. See EVIDENCE, 1.

## JUSTICES.

Under the 20 Geo. 2. c. 19.<sup>1</sup> Justices have no jurisdiction over disputes as to labourers' wages, except in the case of those labourers with reference to whom they have power to make a rate of wages. Thus, a person employed by an attorney to keep possession under a distress is not a servant or labourer within the meaning of the act.—*Branwell v. Pennech*, 7 B. & C. 536.

LABOURERS. See JUSTICES.

## LEGACY.

Executors having accounted with the residuary legatees, and taken a release from all, but retained the share of one by his assent: Held, that an action at law might be maintained against them for such share as a loan, it not being retained in their character of executors, and the objection made, that a legacy was not recoverable at law, being therefore inapplicable.—*Gregory v. Harman*, 1 M. & P. 209.

<sup>1</sup> In the marginal note and in note (b) to p. 537 of the Report, this statute is erroneously cited as 22 Geo. 2.

in London, to St. Albans. — *Stephenson v. Hart*, 4 Bing. 476. S. C. 1 M. & P. 357.

3. An innuendo cannot extend the plain meaning of words. Therefore a declaration stating that the defendant, as secretary to a certain society, was accustomed to publish the names of swindlers and improper persons to be proposed as members, and had published that the defendant was an improper person to be proposed ("meaning thereby that the defendant was a swindler and an improper person," &c.) was held bad after verdict; it not being alleged that it was the custom of the society to designate swindlers by the term "improper persons," &c. — *Goldstein v. Foss*, 4 Bing. 489. S. C. 1 M. & P. 402. (In the Exch. Chamber.)
4. In a declaration for an escape, it was held, on special demurrer, to be sufficient to state that the writ was *duly marked or indorsed for bail*; and that an averment of an affidavit of debt having been made was unnecessary. — *Wilcoxon v. Nightingale*, 4 Bing. 501. S. C. 1 M. & P. 279.
5. The Court refused to compel a defendant to verify a plea of accord and satisfaction by affidavit, or to permit the plaintiff to sign judgment as for want of a plea, on the plaintiff's affidavit of its falsehood. — *Smith v. Backwell*, 4 Bing. 512. S. C. 1 M. & P. 338.  
[N.B. According to the report in M. & P. Mr. J. Park said, that for the future on a motion for a rule to plead several pleas the Court would require the substance of them to be stated.]
6. A count on a promise to marry, generally, is supported by proof that defendant often said that he would marry the plt. in July; he having married another before July. — *Phillips v. Crutehley*, 1 M. & P. 239.
7. In debt on bond, the plea, after craving oyer of the condition, which was that A. should account as collecting clerk, averred that he did account. Replication that he received divers sums for which he did not account. Rejoinder that the sums mentioned in the replication were three certain sums received of B. and that A. accounted for them. Surrejoinder that the sums mentioned in the replication were different from those mentioned in the rejoinder, and concluding to the country. On special demurrer the surrejoinder was held not to contain new matter and rightly concluded, and that the replication was sufficient without stating of whom the sums therein mentioned were received. — *Calvert v. Gordon*, 7 B. & C. 809.

[N.B. An incidental question in this case was, whether the obligation created by such a bond could be discharged by notice that the obligor would be no longer accountable, and Bayley J. intimated a very strong opinion in the negative.]

<sup>1</sup> Mr. Bingham states, as another ground, that it did not appear that the society described in the libel was the society described in the introductory part of the declaration. The objection was made in argument, but is not relied on in the judgment.

8. In a plea to an information for usurping the office of burgess, it was stated that the corporators duly assembled and that the defendant was elected by the major part of them. Replication that regular notice of the meeting had not been given; which was held bad on demurrer, because it assumed that no meeting of the sort could in any case be good without notice, whereas if all had attended without notice the meeting would have been valid. The proper way would have been to deny that the assembly was duly assembled, when all the facts necessary to the decision of the question might have been received in evidence. — *The King v. Chetwynd*, 7 B. & C. 695.
9. In an action of covenant by assignee of reversion, averment that the lessor was seised (not stating of what estate) and devised to plaintiff in fee was held, after verdict, a sufficient averment of title. — *Harris v. Bevon*, 4 Bing. 646.
10. Declaration stated that defendant had contracted to carry the plaintiff from London to Blackheath, and had neglected his duty, whereby she had been injured, &c. She was, in fact, to be conveyed from the Elephant and Castle; but the court held that by London was to be understood not merely the city, but so much of the neighbourhood also as in common parlance was included in the name, and that the variance was immaterial; particularly as the defendant had inscribed London on his coach, though it really went from Charing Cross and did not pass through the city. — *Ditcham v. Chivis*, 4 Bing. 706.
11. Where to an action on a bill of exchange the defendant pleaded a prolix demurrable plea, which appeared a sham plea on the face of it, the court on an affidavit of its falsehood ordered it to be struck out, giving the defendant leave to plead *de novo*. — *Jones v. Studd*, 4 Bing. 663.

And see PRACTICE; TRESPASS; CONTRACT.

#### POOR RATE.

The statute 17 Geo. 2. c. 3. s. 2. enacts that if any overseer shall not permit an inhabitant to inspect the rate, such overseer shall forfeit to the party aggrieved the sum of 20*l*. In an action against an assistant overseer for the penalty under this enactment it was held, 1. That a demand of inspection made by the plaintiff and his attorney (the attorney not being a parishioner and having explained to the defendant that he acted for his employer) was a valid demand. 2. That refusal to an inhabitant constitutes him a party aggrieved within the statute, and that it is not necessary that he should be actually injured by the refusal. 3. That a notice that a rate would be collected forthwith was a good publication, and necessarily implied allowance by the justices. 4. That a demand to see "the rate" was sufficient, there being no other rate in existence at the time. 5. That the refusal was complete though the defendant qualified it by adding, "Bennet (the plaintiff) may see the books by going to the vestry." 6. That an assistant overseer is within the statute of the duty of pro-



ducing the rate has been imposed upon him, but the nature of the defendant's duties not appearing, a new trial was granted for the purpose of ascertaining them. On the second trial the defendant refused, after notice, to produce his appointment, and the judge (Park J.) having left it to the jury to infer from that circumstance, and from his refusal to produce the rate, that it was part of the defendant's duty to produce it, they found for the plaintiff on the counts charging him as assistant overseer. — *Bennett v. Edwards*, 7 B. & C. 586.

2. A demand of inspection made upon an overseer in a field of his a short distance from his house, was held sufficient, the overseer not having objected on the ground of its being inconvenient to him to return home to produce the rate. — *Parker v. Edwards*, 7 B. & C. 594.

#### PRACTICE.

1. In trover proceedings may be stayed on the delivery of part of the goods, if accepted by the plaintiff; who by a refusal renders himself liable to costs subsequently incurred, if he does not recover for more than the part tendered. — *Earle v. Holderness*, 4 Bing. 462. S. C. 1 M. & P. 254.
2. The stat. 43 Geo. 3. c. 46. s. 8. giving costs to parties arrested without probable cause for more than is recovered, does not enable a court, in which the action was not originally commenced, to interfere. Thus where the action was brought in the Palace Court and removed into the Common Pleas, the court refused to order such costs to be taxed. — *Costello v. Carlett*, 4 Bing. 474. S. C. 1 M. & P. 315.
3. The court will not relieve a party arrested in the Tower Liberty under a *capias* without a *non omittas* clause. And *per Cur.* It is for those whose prerogative is invaded to complain, — *Bell v. Jacobs*, 4 Bing. 523. S. C. 1 M. & P. 309.
4. The court rescinded the rule to plead several matters, after the declaration had been amended twice and after trial, on the ground that, legally speaking, the court had been imposed upon in the use made of the rule, though no unfair intention was imputed. — *Gully v. Bishop of Exeter*, 4 Bing. 525.
5. In an action for freight by a ship owner, the court will not grant the defendant an inspection of the log book. — *Rundle v. Beaumont*, 4 Bing. 537. S. C. 1 M. & P. 396.
6. In an action by a shipowner against his broker, the latter is not compellable to give, or permit to be taken, a copy of a letter touching the employment of the ship. — *Rowe v. Howden*, 4 Bing. 539 n. (d). S. C. 1 M. & P. 334.
7. In an action on a bond by obligor, an affidavit of debt made by the obligee and assignee, in which the former swore that the sum was due upon the bond, and that he had assigned it to be the latter, who swore that the bond remained unpaid and owing to him as assignee, was held sufficient. The objection was, that it was not positively

- stated that the debt was due to either. — *Fairman v. Farquharson*, 1 M. & P. 179.
8. In an action for a libel contained in a letter written in the county of B. the venue was changed from London to that county on an affidavit that the *cause* of action arose there, it not appearing that the libel was published or circulated in another county; and this, although the declaration contained counts for slander which it was contended were not covered by the affidavit. — *Tallent v. Morton*, 1 M. & P. 188.
9. A rule is necessary to discontinue a suit, and an averment in a declaration, that a suit was discontinued must be supported by proof of a rule. — *Fanshawe v. Heard*, 1 M. & P. 191.
10. The sum demanded at the commencement of a declaration in debt was 33*l.* Plea that the defendant *did not owe the plaintiff the said sum of 10*l.* above demanded, &c.* Plaintiff signed judgment as for want of a plea, which the court set aside without costs on the ground that the words *above demanded* were sufficiently precise, and that the “ten pounds” might be rejected as surplusage. — *Edginton v. Town*, 1 M. & P. 276.
11. A verdict was taken for the plaintiff with nominal damages, subject to a reference. The arbitrator found that 12*l.* 10*s.* only was due from the defendant, he having been arrested for 30*l.* Held, that the defendant was not entitled to his costs, under the stat. 43 Geo. 3. c. 46. s. 3. (which gives costs in case of arrest without probable cause) although the sum found due by the arbitrator had been tendered previous to the commencement of the action. — *Bryson v. Simcox*, 1 M. & P. 355.
12. A mere irregularity in practice is not pleadable, but must be taken advantage of on motion. Thus where in *sci. fa.* against bail, the rejoinder stated that the *ca. sa.* did not lie in the sheriff’s office four days exclusive, &c. it was held bad on demurrer. — *Sandon v. Proctor*, 7 B. & C. 800.
13. An affidavit to hold to bail was described in the jurat to have been sworn at the King’s Bench Office, Inner Temple, London, the 7th Feb. 1828, before Thomas Chamber, (not further describing him). It was objected that it did not appear, that it was sworn before a person of competent authority, but the court held it sufficient. — *Howell v. Wilkins*, 7 B. & C. 783.
14. The four days before the return day, during which it is necessary for the *ca. sa.* to be in the sheriff’s office in order to charge the bail, are to be computed exclusive of the day on which it is lodged, and of the return day; and an intervening Sunday is not to be reckoned one of the four days. — *Furnell v. Smith*, 7 B. & C. 693.
15. Costs of taxing an attorney’s bill are not allowed to the client, though a sixth is struck off, if an action on the bill is commenced before the order for taxation is obtained. — *Benton v. Bullard*, 4 Bing. 581.

16. An affidavit of debt stating, "that the defendant was indebted to the plaintiff in 20*l.* for money lent on a bill of exchange drawn by S. accepted by the defendant and overdue, [and unpaid]," was held sufficient, though it was contended, that it did not appear that the money was lent to the defendant, or in what character the plaintiff claimed.—*Bennet v. Dawson*, 4 Bing. 609.

17. A had been arrested at the suit of B. a bankrupt, whose name was used for form, and who afterwards died. Administration was taken out, and the administratrix and the assignees disclaimed all interest in the action, but the court refused to discharge A., there being a legal representative (the administratrix) of B. whose duty it was to take the responsibility of discharging him on herself.—*Fothergill v. Walton*, 5 Bing. 711.

And see ATTORNEY; AFFIDAVIT; PLEADING; INSPECTION.

PROBATE. See BONA NOTABILIA.

PROMISE OF MARRIAGE. See PLEADING, 6.

PROMISSORY NOTE.

Bankers agreed to allow a firm, consisting of two partners, to overdraw on receiving as a collateral security, a separate note for 2,000*l.*, from one who took from the other a note payable to order for 1,000*l.*, which was afterwards indorsed to the bankers, but whether before or after the dissolution of the partnership did not appear: Held that the partner by whom the note for 1,000*l.* was given, was liable to the indorsees (the bankers), though no consideration appeared but such as might be implied from the transaction, and though they had notice of the circumstances under which the note was given by the defendant.—*Heywood v. Watson*, 4 Bing. 496. S. C. 1 M. & P. 268.

QUO WARRANTO. See PLEADING, 8.

REPLEVIN.

The parties in replevin, having submitted to arbitration without the privity of the sureties, Held, that the latter were discharged.—*Archer v. Hale*, 4 Bing. 464. S. C. 1 M. & P. 285.

2. Held, that after the lapse of two years, without any step being taken, a replevin cause in the county court was out of court, and the condition of the bond to prosecute without delay broken, though judgment of *non. pros.* in the replevin suit had not been signed.—*Axford v. Perrett*, 4 Bing. 586.

SCOTCH DECREE.

An action is maintainable in the English courts on a Scotch decree for the payment of a sum of money with interest, the decree having been given according to the forms, and in a cause within the jurisdiction of the Scottish courts, and in accordance with the general principles of justice. The statute of limitations does not begin to run until there is a cause of action complete, and no one has a com-

plete cause of action, until there is somebody he can sue. In the present case the defendant was sued as executor, and it was held, that the testator having died abroad and never been suable in England, the statute did not begin to run until the defendant undertook the executorship in this country.—*Douglas v. Forrest*, 4 Bing. 686.

### SET OFF.

A broker who effects in his own name a policy of insurance on goods in which T. was interested, at T.'s request, but on which he has a lien in respect of a debt due to him from T., may set off a loss thereon to an action brought against him by the insurer to recover the amount of premiums received by the defendant as broker in respect of other policies subscribed by the plaintiff. The objection was, that the defendant is not entitled to set-off in respect of a loss, unless he has an interest in the specific goods insured.—*Davies v. Wilkinson*, 4 Bing. 573.

### SETTLEMENT.

A married woman whose husband has been transported, resided with her daughter for thirteen weeks on a property of which she (the mother) and her three sisters were tenants in common, and which at the time of her going to reside was occupied by one of her sisters: Held, that she was irremovable, and that the sessions by quashing the order as to both mother and daughter, virtually decided that the latter was within the age of coverture, and therefore not removable from her mother.—*The King v. Inhabitants of Brington*, 7 B. & C. 546.

2. A renting for a year, subject to a proviso for determining it before the end of the year, is sufficient to satisfy the 6 Geo. 4. c. 57., if the proviso is not acted upon. Thus a house was hired at 20 guineas a year, payable weekly, the tenancy determinable by either party by three months' notice from either quarter day: Held, that the pauper, by occupying and paying rent for a year under this hiring, gained a settlement.—*The King v. Inhabitants of Herstmonceaux*, 7 B. & C. 551.

3. Under the 56 Geo. 3. c. 139. s. 11., (the object of which was to prevent parish officers from clandestinely advancing premiums), an indenture of apprenticeship, by reason of which any expence whatever is incurred by the public parochial funds, is absolutely void, and not voidable merely, unless approved by two justices under their hands and seals; and, if not so approved, no settlement can be gained by service under it.—*The King v. Inhabitants of Stoke Dameril*, 7 B. & C. 563.

4. A certificate under 8 & 9 W. 3. c. 30. s. 1., (the purport of which certificate was an acknowledgment, that the persons named in it were settled in the certifying parish), purporting to be granted in 1758, by two churchwardens and two overseers was held valid, though executed by the overseers and one churchwarden only, and though it was proved that the churchwardens of that year were sworn into office after the day of the date of the certificate; it being presumed in favour of so ancient a document, which had also been treated as valid

by the certifying parish, that the churchwarden who executed it had been sworn before the date. It was also held by Littledale J., that the words of the section requiring the certificate to be under the hands and seals of the churchwardens and overseers, or the *major part of them*, meant the major part of the aggregate body, and not the major part of the overseers alone. And Bailey J. intimated an opinion that the execution of a churchwarden *de facto* would be sufficient.—*The King v. Inhabitants of Whitchurch*, 7 B. & C. 573.

6. The hiring a labourer by a farmer on a Sunday is not prohibited by the stat. 29 Car. 2. c. 7. s. 5.; and such hiring, for a year, and service under it confer a settlement. The stat. only applies to labour, business, or work done in the exercise of a man's ordinary calling.—*The King v. Inhabitants of Whitmarsh*, 7 B. & C. 596.
5. The question being whether the pauper's father had acquired a settlement by purchase, the consideration for which must (by 9 Geo. 1. c. 7. s. 5.) amount to 30*l.* *bonâ fide* paid: Held, per Bailey and Littledale Js., that the fine paid to the lord for his concurrence in the transfer of a copyhold property, was to be deemed part of the consideration, but that the charge paid by the purchaser to his attorney was not. Held by Bailey J., dubitante Littledale J., that the fee to the steward was also to be considered as part of the consideration.—*The King v. Inhabitants of Cottingham*, 7 B. & C. 603.
7. The being charged with and paying parochial taxes did not, even before the stat. 6 Geo. 4. c. 57. s. 2., confer a settlement unless the party resided forty days after being so charged; and therefore a pauper who had rented and paid taxes for a tenement, sufficient before 6 Geo. 4. c. 57. s. 2. to confer a settlement, but had not resided thereon forty days before the passing of that statute, was held not to gain a settlement, because the requisites of that statute had not been complied with.—*The King v. Inhabitants of Ringstead*, 7 B. & C. 607.
8. The wife of an Irishman, who has acquired no settlement in England, may be removed to the parish in which she was settled before her marriage; she having been deserted by her husband, and it not being known what had become of him. Upon his return the parish may pass him and his family to Ireland.—*The King v. Inhabitants of Cottingham*, 7 B. & C. 615.
9. The authority of magistrates must appear upon the face of their proceedings. Thus where the examination of a soldier before two magistrates was tendered in evidence to prove his settlement; but it was not stated therein, nor appeared by other evidence that the party was a soldier at the time, and quartered within the jurisdiction of the magistrates, as required by that provision of the mutiny act which confers the power of taking such examinations: Held, not to be admissible, though the document was forty-five years old.—*The King v. Inhabitants of All Saints*, 7 B. & C. 785.

10. The pauper hired a house *bonâ fide* for a year at the rent of 10*l.* The churchwarden of the respondent parish, who also held lands of the landlord, told the pauper early in the tenancy that he must pay rent to him, and that he would make a reduction of 8*s.* The pauper accordingly paid but 9*l.* 12*s.* to the churchwarden, who paid the whole 10*l.* to the landlord, and was reimbursed out of the parish funds: Held, that it was immaterial by whom the rent of 10*l.* was paid, and that the pauper gained a settlement by the tenancy.—*The King v. Inhabitants of Kibworth Harcourt*, 7 B. & C. 790.

And see EVIDENCE, 4, 5.

#### SPRING GUNS.

A party not having notice of a spring gun being set in a garden, and no notice to that effect having been fixed up on the premises, or otherwise given, is entitled to recover damages for an injury sustained from the gun, though he entered the premises in which it was set without the leave of the owner, but with an innocent purpose.—*Bird v. Holbrook*, 4 Bing. 628.

N.B. This case was prior to the late act.

#### STAMP.

A paper containing merely an acknowledgment of a liability, which the law would imply without it, is not evidence of a contract within the meaning of the Stamp Act. Thus an unstamped memorandum to the following effect, "I have in my hands three bills which I have to get discounted, or return on demand," was admitted in evidence, as it bound the defendant to no more than was implied by law.—*Mullet v. Huchison*, 7 B. & C. 639. And see *Langdon v. Wilson*, 7 B. & C. 640, note.

And see EVIDENCE, 6.

#### STATUTE OF FRAUDS.

The defendant promised verbally to pay a sum of money towards the repair of premises in consideration of the plaintiff's taking a lease of them. The lease was granted, but no mention of the allowance made in it; the plaintiff took possession and repaired, and on applying on the first rent day for the promised sum, was told by the defendant that he would pay it the next quarter day: Held, that the plaintiff was barred from recovering on the special counts by the 4th sect. of the Stat. of Frauds, but that there was a sufficient moral consideration to support the subsequent promise<sup>1</sup>, and that the plaintiff was entitled to recover under the account stated.—*Seago v. Deane*, 4 Bing. 459. S. C. 1 M. & P. 227.

2. A contract in writing for goods made by an agent who was not authorised at the time, but is subsequently recognised by his principal, is sufficient to satisfy the statute of frauds, and binds the prin-

<sup>1</sup> In the marginal note of the Report in M. & P., it is stated that the acknowledgement raised the moral obligation; a statement which completely reverses the order of things.

cipal. The vendor may sell goods which the purchaser refuses to accept, and recover damages for the breach of contract. — *Maclean v. Watkins*, 4 Bing. 722.

#### STOPPAGE IN TRANSITU.

Goods purchased for A. were consigned to the defendant's wharf to be delivered to order. The invoice was sent to A. who was in the habit of warehousing goods at the defendant's wharf; but before any order of delivery to A., or any right of property exercised by him, though after the arrival of the goods at the wharf, they were reclaimed in consequence of an act of bankruptcy committed by A.: Held, that the transitus was not at an end, and that the consignors were entitled to stop the goods. — *Tucker v. Humphrey*, 4 Bing. 516.

2. A contract for goods may be rescinded by the consignee at any time before delivery, so as to prevent the claims of his creditors from attaching. Thus, where after the receipt of the invoice, the vendee gave orders to his attorney to write and stop the goods, who, the day after the arrival of part at the wharf, wrote to the wharfinger not to deliver them to the vendee; and the goods were afterwards taken in execution at the wharf by the defendant, (sheriff of London) at the suit of a creditor of the consignee: Held, that the consignors were entitled to the goods and might maintain trover. — *Bartram v. Fairbrother*, 4 Bing. 579.

STATUTE. See ACT OF PARLIAMENT.

SUNDAY. See SETTLEMENT, 5.

#### SURGEON.

A surgeon having a certificate from the college of surgeons cannot recover for medicines and attendance on a patient in a typhus fever, without a certificate from the apothecaries' company as well; a typhus fever not being a surgical case. — *Allison v. Haydon*, 4 Bing. 619.

#### TRESPASS.

In a justification under a writ the *virtute cujus* is traversable when it involves a matter of fact, though not when merely drawing a legal conclusion. And where by the bills of lading, a cargo was to be delivered to A. he paying freight, and A. having issued a *fi. fa.* against the consignor, and indemnified the sheriff, caused the goods to be seized on shipboard, but subsequently applied to the custom-house as importer: Held, that it was rightly left to the jury to decide, whether the seizure was *bonâ fide* an execution of the writ, or whether the goods were so taken under colour of process to avoid the liability to freight, which it would have incurred by taking possession under the bill of lading. The action was brought by the owner of the vessel, and it was decided that a charter party of affreightment, not demising the ship, did not suspend his right to sue, and that he had sufficient possession of the goods to maintain trespass, although he had no lien for the freight which was not to be paid till after delivery. — *Lucas v. Nockells*, 4 Bing. 729.

**TROVER.**

The plaintiff, as agent to P., held a bill of exchange for 3,500*l.* as a security for 1,000*l.* advanced by P. to E., by whom the bill was deposited, and who expressly authorised its detention till money due to the plaintiff from E. was also paid. The acceptor improperly obtained possession of the bill, and was sued by P., who on the cause being referred, had damages awarded him to the amount of his advances: Held, that the plaintiff also might maintain trover, the general property in the bill being in him, notwithstanding the prior recovery by P.—*Knight v. Legh*, 4 Bing. 589.

And see **BANKRUPTCY**, 5. **PLEADING**.

**VARIANCE.**

In an action against justices the notice stated the warrant under which the supposed wrong was done to have been directed to A. B., though in fact directed to another: Held a fatal variance.—*Aked v. Stokes*, 4 Bing. 509. S. C. 1 M. & P. 346.

And see **PLEADING**.

**VENUE.** See **PRACTICE**, 8.

**VESTRY.**

A select vestry consisting of an indefinite number of persons, continued by an election of new members made by itself, may be established by custom; but the custom should be for a reasonable number calculated with reference to the population of the parish. A faculty from the bishop naming a select vestry is not binding; but the vestry established by it, not being inconsistent with the custom, it was held that the custom was not destroyed by the circumstance of the parish having accepted the faculty, and acted upon it from 1673 to the present time.—*Golding v. Fenn*, 7 B. & C. 765.

**WILL.**

The execution of a will is not valid, unless the attesting witnesses are aware at the time of the nature of the instrument. Per Bailey J., in *Doe v. Tinline*, at the Northum. Ass. Aug. 7, 1828. MS.

**EQUITY.<sup>1</sup>**

**ACCOUNT STATED.** See **PLEADING**, 1.

**AFFIDAVIT.** See **PRACTICE**, 1.

**AMENDMENT.** See **PRACTICE**, 2.

**ATTACHMENT.** See **PRACTICE**, 3, 4.

**AUCTION.**

By condition of sale the purchase money was to carry interest; a deposit of 20*l.* *per cent.* was to be paid, and the auction duty borne

<sup>1</sup> The most important cases in the last number of Bligh are included in this digest.



equally. The purchaser paid only the required deposit, out of which the auctioneer paid the whole duty: Held, that interest was due on that portion of the deposit which had been applied to the payment of the purchaser's moiety of the duty.—*Townshend v. Townshend*, 2 Russ. 308.

#### AWARD.

A. gives a bond and judgment to B. who assigns it to C., C. having been declared on award entitled to the benefit of the judgment, files a bill on the ground of the award, and obtains a decree. From this A. appeals because the judgment was given for a larger sum than was due, and only as a security for what was actually due; but upon proof that these objections were stated before the arbitrators by A.'s counsel, the decree was affirmed with costs.—*Hill v. Ball*, 1 Dow. 164.

**BANKRUPT.** See PRACTICE, 5, 6.

**BROKER.** See PLEADING, 2.

#### CHARITY.

An improper lease by trustees of charity lands, though containing a covenant with the lessees for his actual enjoyment during the term, cancelled *in toto*.—*Att. Gen. v. Morgan*, 2 Russ. 306.

See PRACTICE, 17.

**CONTEMPT.** See PRACTICE, 7.

**COSTS.** See PRACTICE, 8.

#### CREDITOR.

On a creditor's suit against an executor for administration of the assets of B. a joint creditor of A. and B. was permitted to prove; A. having become bankrupt, and it appearing that there were no joint assets of A. and B.—*Cowell v. Sikes*, 2 Russ. 191.

#### DEVISE.

1. Devise after other particular estates to A. for life, remainder to certain of his sons for life, remainder to their first and other sons in tail in their order; proviso that if A. or any of his sons should become entitled under the limitations aforesaid, the estate should be charged with a sum for B.: A.'s grandson is the first of his family who comes into possession: Held, he took subject to the charge. *Lorton appellans, Gore respondent*, 1 Dow, 190.
2. A. being lessee for 21 years, assigned by his marriage settlement the premises and his advantage of renewal therein, &c. to trustees in trust out of the profits to pay the rents, &c. and raise a competent sum for renewing the lease when customary, and to renew it accordingly; and subject thereto, to pay the rents to A. during his life, and after his death upon trust for the sons of the marriage, and on failure of those trusts for A. absolutely. A. devised his manor, &c. held by lease from &c. to the said trustees, with directions to perform the

covenants contained in the new lease, or any leases hereafter to be procured, to collect a competent sum for renewing the lease, and to renew the same from time to time. After the date of this will A. surrendered the existing, and obtained a renewed lease: Held, that this renewed lease, and all future renewals, were devised by and subject to the trusts of the will.—*Colegrave v. Manby*, 2 Russ. 238.

3. Devise of all my manors, &c. in the parishes of A. B. and C. "or elsewhere in the kingdom of England:" testator had no lands in *England* except in the aforesaid parishes, but he had a large estate in Wales. Quære whether it passed.—*Okeden v. Chifden*, 2 Russ. 309. the words "or elsewhere in the kingdom of England" are ambiguous. Ibid. 317.

**DISCOVERY.** See **PLEADING**, 2. 3.

#### **DONATIO MORTIS CAUSA.**

There may be a good donatio mortis causa of a mortgage by the delivery of the mortgage deed creating a trust by operation of law.—*Duffield v. Elwes and others*, 1 Bligh, 497.

2. The distinction between a donatio mortis causa and a nuncupative will is that the first is claimed against, the other from the executor. Ibid. 529.

#### **EVIDENCE.**

1. Marriage articles lost: evidence that the house of the person who ought to have the custody of them was ransacked by French troops and rebels, and many papers destroyed; and that diligent search had since been ineffectually made: presumed that they had been destroyed and secondary evidence of their contents admitted.—*Lorton v. Gore*, 1 Dow, 190.

**EXAMINATION.** See **PRACTICE**, 9.

**EXCEPTIONS.** See **PRACTICE**, 10, 11.

**EXECUTOR.** See **DONATIO MORTIS CAUSA**; AND **PRACTICE**, 12.

#### **FINE.**

A fine and nonclaim cannot be pleaded in bar to a bill filed to prevent the setting up of an outstanding term. — *Leigh v. Leigh*, 1 Simons, 349.

#### **FOREIGN SOVEREIGN.**

A foreign sovereign may sue in this country in equity, as well as at law.—*Hullet v. King of Spain*, 1 Dow, 169.

[Note. — The house would not disparage the dignity of the king of Spain by giving him costs.]

**IMPERTINENCE.** See **PRACTICE**, 13.

#### **INCUMBRANCES.**

With respect to the question whether incumbrances which have been bought up by the term tenant are merged, it seems that the tenant for life of an estate in strict settlement, who has purchased the ulti-

mate remainder, is to be viewed as owner of the inheritance, if the intervening contingency is so remote that the court will not regard it.—*Astley v. Miller*, 1 Simons, 298.

2. Such a tenant for life bought up some of the charges on the estate, and had them assigned to a trustee: the ultimate remainder was then conveyed to him subject to the subsisting charges: he then devised the estate subject to the charges that might be thereon at his decease. The intermediate remainders failed at his death: Held, that the purchased charges were merged, and that parol evidence was admissible to prove that the testator so intended. S.C.

**INTERPLEADER.** See PRACTICE, 14.

### ISSUE.

The object of an issue from equity is attained, when the conscience of the judge in equity is satisfied that justice has been substantially done.—*Collins v. Hare*, 1 Dow, 139.

### LEASE.

1. A lease for 21 years had been usually renewed every seven years, and in February 1805 was renewed by the tenant for life under the will of the lessee: in 1812 an exorbitant fine was demanded and no renewal took place; and in 1819 the lessor expressly refused to renew: the tenant for life died in January 1819; and in the following February the remainder-man renewed: Held, that the remainder-man was entitled to receive out of the assets of the tenant for life the amount of what would have been reasonable fines for renewal in February 1812, and February 1819, subject to a porportional abatement for the period which intervened between the death of the tenant for life and the renewal in February 1819.—*Colegrave v. Manby*, 2 Russ. 238.
2. A notice was given under the Irish Tenantry Act by a landlord to a lessee for lives, renewable for ever, to pay his fines and renew; but the lessee, though ready to pay them immediately on the notice, did not tender them till upwards of three years after by reason of a difficulty arising from a collateral matter: Held, he was entitled to a renewal; reserving the landlord's right as to the collateral matter.—*Trant appellant, Dwyer respondent*, 1 Dow, 125.

### LEGACY.

A testator gives to A. by will, 5000*l.* sterling, to be paid at 24, "with power to the executors, in the mean time, to apply the principal or interest towards his maintenance, education, or advancement:" and by codicil, 5000*l.* "like sterling money, on his attaining the age of 24."

Also to B. and C. by will, 2000*l.* sterling, "with interest from the day of his death;" and by codicil, 2000*l.* "like sterling money:" Held, in both instances, that the legacies given by the codicil were additions to, and not substitutions for, those given by the will.—*Mackenzie v. Mackenzie*, 2 Russ. 262.

## LIMITATION OF ACTIONS.

1. A bill filed by a creditor on behalf of himself and the other creditors will prevent the statute from running against any who come in under the decree.—*Sterndale v. Harekinson*, 1 Sim. 393.
2. A. the agent of B. in the habit of making payments for B. sometimes with money furnished by him, and sometimes out of A.'s own funds. A. pays 2000*l.* in 1764 for B. who dies in 1781, leaving A. his executor. No claim having been made by A. during B.'s life, nor afterwards until 1819; the 2000*l.* presumed to have been paid out of B.'s money, and A.'s claim barred by lapse of time.—*Lorton v. Gore*, 1 Dow, 190.

See PRACTICE, 15; PLEADING, 4.

## LUNATIC.

The court will not sanction building leases for 999 years of a lunatic's estate.—*Re Starkie, a lunatic*, 2 Russ. 197.

MASTER'S CERTIFICATE. See PRACTICE, 16.

MASTER AND SERVANT. (*Undue influence.*)

Where a master having ensured his life for 3000*l.* assigned the policy to his confidential clerk, who paid the premium upon 1000*l.* and upon the master's death, a letter was found in his will declaring the policy to have been obtained by undue influence; Held, that this, coupled with other circumstances, rendered the assignment, as to the two thirds of the policy for which the master had paid the premium, fraudulent and void.—*Collins v. Hare*, 1 Dow, 139.

MOTION. See PRACTICE, 1.

## MODUS.

1. For many years several small sums amounting to about the sum pleaded as a township modus, had been paid by the inhabitants severally and not collectively to the rector: Held, that those sums could not together make a township modus; to render which good it should be payable by each and every of the inhabitants, and ought not to be collected by the rector.—*Jackson and Lord Lonsdale v. Benson*, 1 Y. & J. 46.
2. The conviction of quakers for non-payment of their tithes or prescriptive payments is strong evidence against a township modus in respect of those tithes. S. C.
3. Semble that where a township modus is clearly established, it will cover all the lands within the township. S. C. 56.
4. And every occupier is bound to the rector for the whole sum. S. C. 53.
5. Where the answer does not set out a complete modus, or state so much of it as could be supplied by evidence of fact, if the court were to direct an issue, the rector is not deprived of his common law right to tithes in kind.—*Goodenough v. Powell*, 2 Russ. 219.

**MORTGAGE.**

1. The purchaser of an estate A. secured his purchase money by mortgaging his estate B. and in the latter part of the same deed, his estate A. likewise, as a further and collateral security: the two estates went to two different persons, who respectively derived title from the purchaser: Held, under the circumstances of the case, that A. was not to be resorted to by the mortgagee till B. was exhausted.—*Marquis of Bute v. Cunningham*, 2 Russ. 275.
2. When a person mortgages freeholds, and shortly afterwards copyholds likewise, to secure the same debt, the mortgagee may go against either or both; and if he resorts to the freeholds, the specialty creditors of the mortgagor will stand in the mortgagee's place against the copyholds to the extent of the sum which he receives from the freeholds.—*Gwynne v. Edwards*, 2 Russ. 289. *in notis*.
3. A mortgagee of leaseholds gave up the indenture of lease to the mortgagor to be shewn to an intending purchaser: the mortgagor concealed from the purchaser the fact of an existing incumbrance, and left the lease with him; and within a week afterwards conveyed the premises to purchaser and received the purchase money: the result of the evidence was that the agent of the mortgagee stated to the agent of the purchaser that whenever the purchase was carried into effect, the mortgagee was to be paid out of the purchase money: Held that this was not such negligence on the part of the mortgagee as amounted to fraud, and that he was not to be postponed to the purchaser.—*Martinez v. Cooper*, 2 Russ. 198.

And see INCUMBRANCE.

**ORDER.**

Under the usual order for the production of books &c. the master may direct the party to leave them as long as he thinks fit!—*Sidden v. Liddiard*, 1 Sim. 388.

**PARTNER.**

Where a partner borrows a sum of money, and gives his own security for it, it does not become a partnership debt by being applied for partnership purposes with the knowledge of the other partner.—*Bevan v. Lewis*, 1 Sim. 376.

See SOLICITOR, 1.

**PLEADING.**

1. A stated account, to form the subject matter of a plea must be a clear statement of accounts, certified by the signature of the parties, as evidencing their approbation of the settlement, so as to bring the issue to a single point, not requiring proof from the examination of numerous witnesses, but only by the bare production of the account.—*Att. Gen. v. Brooksbank*, 2 Y. & J. 37.

<sup>1</sup> Vide 60th of Lord Lyndhurst's Orders of April 3, 1828.

2. A broker in the city of London must answer a bill of discovery filed by his employer in aid of an action for misconduct, notwithstanding the discovery will subject him to the penalty of a bond given by him to the corporation of London on his admission.—*Green v. Weaver*, 1 Sim. 404.
3. If a plaintiff asks relief, and discovery as ancillary thereto, and the ground for relief fails, he is not entitled to the discovery. — *King v. Rossett and another*, 2 Y. & J. 33.
4. The statute of limitations may be pleaded in bar to a bill to prevent the setting up of an outstanding term in an action of ejectment.—*Jereny v. Best*, 1 Sim. 373.
5. On a bill to set aside the sale of an estate on the ground of fraud, the plaintiff is not at liberty to give in evidence that, at the time of the purchase the defendant acted as solicitor to the plaintiff, and had taken advantage of that character to impose upon him; on the ground that the fact not having been put in issue, it would be a surprize on the defendant.—*Williams v. Llewellyn*, 2 Y. & J. 68.

#### POWER.

If a tenant for life with a power to lease, makes leases not in conformity with the power, and dies bequeathing his personalty to the next remainder-man, the executors may refuse to pay it to him, unless he either confirms the leases, or indemnifies the executors. — *Vernon v. Egmont and others*, 1 Bligh. 554.

#### PRACTICE.

1. On a motion to discharge an order of the Vice Chancellor, affidavits sworn subsequently to that order, and stating new facts; allowed to be read on the ground that the application was not an appeal, but a new motion.—*Const v. Barr*, 2 Russ. 161.
2. Upon an application for the plaintiff to amend without prejudice to an injunction previously obtained, the nature of the amendments must, in the *Exchequer*, be specified.—*Bell v. Brookbank*, 2 Y. & J. 181.
3. An order for time to answer, unless served, cannot stop an attachment.—*Gayler v. Fitzjohn*, 1 Sim. 386.
4. Attachment granted for non-appearance to a subpoena served abroad, —*Nichol v. Gwyn*, 1 Sim. 389.
5. The defendant in a suit by the assignees of a bankrupt cannot object that the bill was filed without the consent of the creditors, unless the objection is raised by the answer. — *Bevan v. Lewis*, 1 Sim. 376.
6. The validity of a commission of bankrupt can in no case be disputed, where the notice required [by the act has not been given].—*Ibid.*
7. Though a defendant in contempt to an attachment for disobedience of a decree is already in the Fleet for another cause, a *habeas* must

\* Vide stat. 6 G. 4. c. 16. s. 90. et seq.

- issue to bring him to the bar of the Court in order to answer his contempt.—*Knowles v. Chapman*: *Davison v. Colling*, 2 Russ. 166. n.
8. A plaintiff resident abroad not having given security for costs in compliance with an order to that effect; ordered, that he should give the security or have his bill dismissed.—*Camac v. Grant*, 1 Sim. 348.
9. After publication passed, and the cause set down for hearing, the plaintiff upon motion, paying the costs of the application, will be allowed to examine witnesses to prove the execution of a will. *Coley v. Coley and others*, 2 Y. & J. 44.
10. Where a great number of exceptions had been taken to an answer, and shortly before the arguments were submitted to, the Court refused to give extra costs, but reserved the consideration of them until the hearing.—*Attwood v. Small*, 2 Y. & J. 72.
11. Exceptions to an answer filed after the will has been amended will not be taken off the file for irregularity, if the amendments were not of a nature to require an answer.—*Miller v. Wheatley*, 1 Sim. 296.
12. Two executors appointed: one only proves; by whom an action is brought in the name of both, in pursuance of the rule of law requiring all the executors to join: the defendant at law filed his bill for an account and injunction, which he obtains for want of an answer. On the acting executor afterwards putting in a full answer, and an affidavit that the other executor, who resided out of the jurisdiction, refused to act or interfere in any way in the suit, the Court granted an order *nisi* to dissolve the injunction.—*Kilby v. Stanton*, 2 Y. & J. 75.
13. A party cannot, after filing an affidavit in support of a motion, refer it for impertinence.—*Keeling v. Hoskins*, 2 Russ. 319.
14. An affidavit is unnecessary to support a motion by the plaintiff in an interpleading suit, for liberty to pay the money into court, and for an injunction.—*Walbanke v. Sparks*, 1 Sim. 385.
15. On a bill by a creditor against an executor, the court, in consequence of some doubt as to the validity of the debt, retained the bill for a year, with liberty to the plaintiff to bring an action at law: but afterwards, on motion, restrained the defendant from insisting at law upon the statute of limitations, which had taken effect since the filing of the bill.—*Sirdefield v. Price*, 2 Y. & J. 73.
16. The master's certificate as to the production of books, &c. cannot be excepted to: the proper course is to move, on affidavit, that it be quashed.—*Jones v. Powell*, 1 Sim. 387.
17. Trustees of a legacy for charitable purposes may file a bill for payment; an information by the attorney general being unnecessary.—*Mavor v. Nison*, 2 Y. & J. 60.

18. Where a defendant is in the King's Bench on mesne process, a *habeas corpus* must issue with a view to his being turned over to the Fleet.—*Neame v. Wagstaff*, 1 Sim. 390.
19. The court will remove a next friend, connected with a person having an interest adverse to that of the infant.—*Peyton v. Bond*, 1 Sim. 390.
20. An order on two solicitors, as partners, is not duly served by serving it on one of them, and leaving a copy at the place where the partnership business is carried on.—*Young v. Goodson*, 2 Russ. 255.
21. Irregularity in a sequestration may be waived, by the party against whom it is issued, permitting the sequestrate to deal with the property.—*Coust v. Barr*, 2 Russ. 161.
22. A witness who has been examined at or before the hearing, only to prove exhibits, may be examined to prove other deeds, &c. before the master, without a special order.—*Courtenay v. Hoskins*, 2 Russ. 253.
23. The refusal of a witness to be cross examined is not ground for suppressing his depositions, after publication; the adverse party should have applied to the court at the time of refusal.—*Ibid*.

#### PRINCIPAL AND AGENT.

The mere relation of principal and agent will not entitle the former to relief in equity.—*King v. Rossett and another*, 2 Y. & J. 33.

PROCESS. See PRACTICE, 18.

PROCHEIN AMI. See PRACTICE, 19.

PROOF. See CREDITOR, 1.

RENEWAL. See LEASE.

SERVICE. See PRACTICE, 20.

SEQUESTRATION. See PRACTICE, 21.

#### SOLICITOR.

One of two solicitors having become bankrupt, the court refused upon motion by the other, to order the assignees to deliver to him the papers belonging to the clients of the firm.—*Davidson v. Napier*, 1 Sim. 297.

See PLEADING, 5.

#### SPECIFIC PERFORMANCE.

Agreement on sale of the lease of a public house by executors, that the furniture, stock, &c. should be taken at a valuation; and possession given on 29th Sept. 1821: the valuation was made, but the purchaser refused to perform his contract: executors file a bill, in the meantime keeping possession and carrying on the business: Held that the decree could only be for principal and interest of such parts of the stock valued as could be delivered to the defendant—who was chargeable for rent, taxes, and necessary outgoings; and not entitled to occupation, rent, or allowance, for the use of the house and furniture.—*Dakin v. Cope*, 2 Russ. 170.



**TERM.**

When a term which is prior to legal limitations, is satisfied, the termor is a trustee for him who is entitled under those limitations: and equity will prevent the term from being set up against that person.—*Leigh v. Leigh*, 1 Sim. 349. And see *FINE*.

**WILL.**

Testator bequeathed certain stock upon trust, for his wife for life; remainder to his brother for life; and after the decease of the survivor of wife and brother, he directed 1800*l.* should be sold, and that the produce should be paid to, and equally divided between a nephew and four nieces, share and share alike. “And my mind and will further is, that in case of the death of my said nephew, or of any or either of my said nieces, without lawful issue, before their respective parts or shares of the said sum shall become due and payable to them under and by virtue of this my will, that the part or share of him, her, or them so dying without issue as aforesaid, shall go to and be equally divided between and amongst the survivor and survivors of them, share and share alike.”

The wife, nephew and nieces, survived testator.

Mary Powell, one of the nieces, died in the lifetime of wife, leaving a son; but which son afterwards died before the wife. Then Jane Greenwood, another of the nieces, died *s. p.* in the lifetime of the wife.

Held, that though Mrs. Powell died leaving issue, yet that issue having afterwards died before the share became payable, she took nothing under the will.

That Jane Greenwood having survived Mrs. Powell and her son, became entitled to a distributive portion of Mrs. P.'s share; but as she herself afterwards died before the shares became payable, her own original share went to the *surviving*\* legatees, three in number (the nephew and two nieces). But on the authority of *ex parte* West, (1 Br. C. C. 575.) his lordship was of opinion, that her accrued share taken upon Mrs. P.'s death without issue, did not go over on her death without issue.

One of the nieces, who survived the wife, had with her husband mortgaged her share; the husband died before the wife of testator: Held, that such mortgage was invalid.—*Crowder v. Stone*. Linc. Inn, Aug. 19, 1828. Lyndhurst, C.—*Honour v. Norton*.

**WITNESS.** See *PRACTICE*, 22, 23.

\* His Lordship referred to *Wilmot v. Wilmot*, as governing the construction of these words. 8 Ves. 10.

# RULES OF COURT.

## IN THE KING'S BENCH.

*Hilary Term, 8 & 9 Geo. 4.*

WHEREAS great expence is often unnecessarily incurred in making up demurrer books, from setting forth those parts of the pleadings to which the demurrers do not apply. IT IS THEREFORE ORDERED, that from and after the end of this term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied, the master shall not allow the costs thereof on taxation either as between party and party, or as between attorney and client.

BY THE COURT.

(7 B. & C. 642.)

## IN THE COMMON PLEAS.

*Hilary Term, 8 & 9 Geo. 4.*

THE above rule was adopted verbatim by this court. 4 Bing. 549.  
1 M. & P. 401.

*Easter Term, 9 Geo. 4.*

## REGULA GENERALIS.

WHEREAS it has been suggested to us, that inconvenience may in some cases arise, if the rule of this court, made in Hilary term last, respecting the taking the acknowledgments of persons levying fines or suffering recoveries before commissioners, be continued in its present extent.

And whereas it appears to us upon consideration of the matters so sug-

gested, that it will be more convenient to revoke the said rule, and make another in lieu thereof; it is therefore ordered by the court, that from and after the first day of the next term, the said rule shall be and the same is hereby revoked.

And it is hereby further ordered, that from and after the said first day of the next term, when the acknowledgments of any person or persons levying fines or suffering recoveries shall be taken before commissioners, one at least of the commissioners for the taking the acknowledgment of any party to such fine or recovery, shall be a person who is not concerned as the attorney, solicitor, or agent or clerk to the attorney, solicitor, or agent of any party thereto, and that in the affidavit to be made of the due taking of such acknowledgment, it shall be deposed, in addition to the facts now required by the rules of the court to be included in such affidavit, that one (at least) of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the parties to the fine or recovery for the taking the acknowledgment to which the commission, under which he has acted, has been issued, and the name and residence of such commissioner shall be stated in such affidavit.

It is further ordered, that from and after the first day of next term, the commissioners do enquire of married women whether they intend to give up their interests in the estates to be passed by any fine or recovery, without having any provision made for them in return for or in consequence of their so giving up such interests; and if it appears to such commissioners that any provision is to be made on any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been made; and one of the commissioners taking the acknowledgment of such married woman, shall state in the affidavit to be made of the due taking such acknowledgment, that such enquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made; and where such married woman, in answer to such enquiry, shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

And it is hereby further ordered, that from and after the first day of the next term, the affidavit of the due taking of any acknowledgment to any fine or recovery shall be in the form hereunto annexed, with such variations only as the circumstances of the case shall render necessary, and that the party or parties making the same do pursue the exact words of such form, and do not, unless absolutely necessary, substitute others which he or they may think synonymous thereto.

And, lastly, to avoid the delay and expence occasioned by any variance in the names of any of the parties making such acknowledgments between their signature thereto and the precept prefixed to such acknowledgment, or the *dedimus potestatem*, under which the same is taken, it is ordered

that the commissioners, before they sign their names to the caption of such acknowledgment, do take care that the signatures of the parties correspond with the precipe and dedimus, and that if any of the names are not correctly stated in the dedimus, they forbear to take the acknowledgment until the writ shall have been amended by the proper officer.

W. D. BEST,  
J. A. PARK,  
J. BURROUGH,  
S. GASELEE.

*Form of Affidavit to be made by one of the Commissioners taking the Acknowledgment of a Fine or Recovery.*

A. B. in the county of gentleman, one of the attorneys of his Majesty's court of at Westminster, and one of the commissioners named in the writ of *dedimus potestatem* for taking the acknowledgment of the fine hereunto annexed [or, receiving the attorney or attorneys of C. D. and E. his wife], maketh oath and saith, that he knows C. D. and E. his wife [if part only of the conuzors, "two of"] the conuzors named in the said fine [or, if a recovery, the said C. D. and E. his wife], and that the same [or, if a recovery, the warrant of attorney, a copy whereof is hereunto annexed] was duly signed and acknowledged by them the said C. D. and E. his wife, before this deponent and J. K. gentleman, one other of the attorneys of his Majesty's court of at Westminster, and another of the commissioners named in the said writ, on the day and year [or, days and year] mentioned in the caption [or, in the first (second or third) caption] thereof. And that the said C. D. and E. his wife, and also this deponent and the said J. K. were and each of them was at the time of the taking and acknowledging of the said fine [or, warrant of attorney] of full age and competent understanding, and that the said E. was [or, were] solely and separately examined apart from her said [or, their respective] husband [or, husbands] and freely and voluntarily consented to and acknowledged the said fine [or, warrant of attorney]. And that the said C. D. and E. his wife severally and respectively knew the same to be a fine [or, that the said warrant of attorney was intended for the suffering a common recovery] to pass his, her, and their estate and estates. And this deponent further saith, that he this deponent [or, the said J. K., as the case may be, adding if not the commissioner making the affidavit, "whose place of residence is at"] is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any or either of the parties to the said fine [or, recovery]. And this deponent further saith, that in pursuance of the order made by this honourable court in Easter term in the eighth year of the reign of His Majesty King George the Fourth, respecting the acknowledgment of fines and recoveries, the said commissioners did enquire of the said E.



whatsoever, executed under the authority of any of the hereby repealed Acts."

II. The first part of this section is similar to the first section of the 57 Geo. 3. c. 105., and of the 57 Geo. 3. c. 130., and provides that where a number of persons have formed or shall form a society for the purpose of receiving deposits of money for the benefit of the depositors, to accumulate at compound interest, and to be returned to the depositors, their executors or administrators, (deducting the necessary expences of management) and shall be desirous of having the benefit of this Act, such persons on depositing and filing their rules in the manner directed in this Act, (post, s. 3.) shall be entitled to the provisions of the same. It further provides, (according to the 58 Geo. 3. c. 48. s. 16.) that the trustees of such institutions may invest money in the Banks of England or Ireland, and receive receipts for the same in the manner hereafter authorized. (post, s. 11—16.) But it is also provided, that in future all such institutions must first be sanctioned and approved of by the court of general quarter sessions, and by the commissioners for the reduction of the national debt, or on their behalf, by the comptroller-general, or assistant comptroller acting under the commissioners.

III. The rules and regulations of the institution are to be entered in a book, to be kept by an officer appointed for that purpose, which book is to be open at all seasonable times for the inspection of persons making deposits, and a copy thereof to be made on parchment, and deposited with the clerk of the peace, for the county or division, who is to file the same with the rolls of the sessions of the peace, and to sign a certificate of such enrolment on a duplicate copy, to be provided by the institution, and returned to them on payment of a fee of ten shillings, which fee however is not to be paid unless the certificate is returned within ten days. Additional rules, or alterations in or amendments of old rules, may be made, and will be in force on being entered in such book, and deposited with the clerk of the peace, who must file and certify the same as above directed, on payment of a fee of five shillings. [This clause is the same as 57 Geo. 3. c. 105. s. 2. and 57 Geo. 3. c. 130. s. 2. with the addition of the fees to the clerk of the peace.]

IV. The transcript of the rules and regulations, before being deposited with the clerk of the peace, is to be submitted by the trustees or managers of the institution to a barrister-at-law, to be appointed by the commissioners for the reduction of the national debt, for the purpose of ascertaining whether they are in conformity to law, and to the provisions of this Act; and the barrister is to give a certificate of their conformity, or to point out in what respect they are repugnant to law, for which such barrister may not at any one time receive a larger fee than one guinea. The transcript signed by two trustees, together with the barrister's certificate, is to be laid before the justices of the county or division at the next general or quarter sessions next after the time when it has been deposited with the clerk of the peace, and the justices have the power to confirm the transcript, or to reject and disapprove of

any part thereof which shall not be conformable to the intent and meaning of this Act; and after such rejection or disapproval such rules so rejected or disapproved of are to be no longer in force, of which the clerk of the peace must give notice in writing to the two trustees by whom the transcript was signed. [That part of this section which requires the rules, &c. to be laid before a barrister is new; the remainder is the same as the 58 Geo. 3. c. 48. s. 17.]

V. This section is the same as the 57 Geo. 3. c. 106. s. 4. and the 57 Geo. 3. c. 130. s. 4. and enacts that the rules, when entered and deposited as directed above, shall be binding on the members and officers of the institution, and on the depositors and their representatives: that an examined copy of the transcript shall be received as evidence of the rules in all cases; and shall not be removed by certiorari into any of his majesty's courts of record. The copy of the transcript is to be made without fee, except the actual expence of making it, and not to be subject to any stamp duty.

VI. This section, which is nearly a re-enactment of 57 Geo. 3. c. 106. s. 3. and 57 Geo. 3. c. 130. s. 3. requires that it shall be expressly provided by the rules, that no person being treasurer, trustee or manager, shall derive any benefit from any deposit made in the institution, nor shall have any salary or allowance beyond their actual expences, and that officers employed in the management thereof shall only have such salaries and allowances as shall be provided for by the rules.

VII. The treasurer or other person entrusted with the receipt or custody of money, and every officer receiving a salary, must give security, to be approved of by two trustees and three managers, in a bond to the clerk of the peace; on which bond, in case of forfeiture, the trustees may sue in the name of the clerk of the peace; such bond to be free from stamp duty. [This section is an extension to all cases of the provisions of 57 Geo. 3. c. 106. s. 6. and 57 Geo. 3. c. 130. s. 7.]

VIII. All monies, goods, effects, securities for money, &c. are to be vested in the trustees for the time being, for the use and benefit of the institution, and the respective depositors, their respective executors or administrators; and on the death or removal of any trustee, are to vest in his successor for the same estate and interest, without any assignment or conveyance: the trustees may bring or defend any action, suit or prosecution concerning any property, right or claim of the institution, and may sue and be sued in their proper names as trustees of such institution; and in case of death or removal of them or any of them, no such action, suit or prosecution is to abate, but to be proceeded in by the succeeding trustees in the name of the person or persons who commenced the same, such succeeding trustees to pay or receive the like costs as if the action had been commenced by them. [This section is the same as the 57 Geo. 3. c. 106. s. 8. and the 57 Geo. 3. c. 130. s. 8.]

IX. No trustee or manager is to be personally liable except for his own acts and deeds, and then only in cases of wilful neglect or default. [This enactment is new.]

X. All persons having the disposition or custody of any monies or effects belonging to the institution, or of any securities, books or papers; or property relating to the same, their executors, administrators and assigns, on demand made in pursuance of an order by not less than two trustees and three managers, or at a general meeting of the trustees or managers, must give in an account to the trustees or managers, or to such general meeting, or to any person nominated to receive such account, to be examined and allowed or disallowed, by such trustees or managers respectively; and on a like demand must give in all monies, effects, books, &c. in their hands, to whomsoever such trustees or managers shall appoint: in case of neglect or refusal, the trustees may exhibit a petition to the justices at the general or quarter sessions for the county or division, who may proceed in a summary manner, and whose order will be final. [This section differs from the 57 Geo. 3. c. 106. s. 23. and 57 Geo. 3. c. 130. s. 21. only in the addition of the words "goods, papers and property;" and in the authority to make the demand being given to two trustees and three managers, instead of the committee.]

XI. The money belonging to the Savings Banks is to be invested in the Bank of England, or Ireland, in the names of the commissioners for the reduction of the national debt, and in no other security whatever, except such sums as shall necessarily remain in the hands of the treasurers, to answer the exigencies of the institution: the above provision however, is not to deprive any depositor of the power of withdrawing his money, and investing it in any other security. The trustees are empowered to pay into the banks of England or Ireland any sum not less than fifty pounds, upon the declaration of any two or more of the trustees, that such money belongs exclusively to the institution for which the payment is intended to be made, such sum to be placed into the account raised in the names of the commissioners in the books of the banks of England and Ireland respectively, denominated "The Fund for the Banks for Savings." Previous to the payments being made, an order under the hands of two trustees of the institution must be produced to the officer of the commissioners at their office in London or Dublin. [This section is almost entirely taken from the provisions of the 57 Geo. 3. c. 106. s. 9, 10, 11.; the 57 Geo. 3. c. 130. s. 9, 10, 11.; and the 6 Geo. 4. c. 62. s. 15. 27.]

XII. The trustees, however, are not prevented from receiving money from a depositor, to be applied in any other way than that specified in this Act, but they may apply such money for the benefit of the several depositors, in any other manner, according to the rules and regulations of the society. [This section is entirely new.]

XIII. Where branch banks are established in the neighbourhood of a larger central bank, the trustees of the latter may pay into the bank of England or Ireland, together with their own monies, the monies belonging to such branch banks; but in such case the treasurer of the branch bank must certify to the treasurer of the central bank, that the



amount contributed by any one subscriber, does not exceed the proportion authorized by this Act. [The same as 56 Geo. 3. c. 48. s. 16.]

XIV. If the declaration or order required by s. 11. of this Act contain any thing false or untrue, the sum paid into the bank of England or Ireland is to be forfeited to the commissioners. [The same as 57 Geo. 3. c. 105. s. 17. and 57 Geo. 3. c. 130. s. 17.]

XV. The commissioners are to invest the money paid in on account of Savings Banks, either in the purchase of bank annuities or exchequer bills, and also the interest that shall from time to time become due thereon. [This differs from the 57 Geo. 3. c. 105. s. 14. and 57 Geo. 3. c. 130. s. 14. only in allowing the money to be laid out in the purchase of exchequer bills, as well as of bank annuities.]

XVI. On the payment of money into the Banks of England and Ireland by trustees of Savings Banks, to the account of the commissioners for the reduction of the national debt, their officer is to give receipt for the same, carrying interest at the rate of 2½d. per cent. per diem, payable with the principal, whenever the same shall be required or drawn for in manner directed by this Act [post, s. 18, 19, 20, 21.] such interest is to be chargeable on the stock or exchequer bills standing in the names of the commissioners: receipts issued prior to the 20th of November in this year, are from that day to carry interest at the rate of 2½d. per cent. per diem. [On comparing this section with 1 Geo. 4. c. 83. s. 2. and 5 Geo. 4. c. 62. s. 2. it will be seen that the interest is lowered from threepence per cent. per diem to twopence-halfpenny.]

XVII. The interest due on the money mentioned in the receipt is to be calculated by the commissioners, half-yearly, up to the 20th of November, and the 20th of May, and within six weeks from those dates respectively, and from such dates to bear interest as principal, for which also a receipt is to be given to the trustees within six weeks after such respective dates, and bearing date the 21st of November and the 21st May respectively: provided, however, that no interest is to be computed on the fractional part of a pound. The managers and trustees of Savings Banks may direct that the interest payable to depositors shall be calculated yearly or twice a year, and be carried to the credit of the respective depositors as principal. [The same as 1 Geo. 4. c. 83. s. 3.]

XVIII. Before the trustees can make an order or draft for payment of any money under this Act, by the commissioners, an agent must be appointed under the hands and seals of not less than two of such trustees, (such appointment to be attested by two managers of the Savings Bank) to receive such money as the trustees shall from time to time require to be paid; the appointment must be deposited with the commissioners fourteen days before payment of any sum of money. The trustees who made the appointment, or the survivor of them, together with another trustee, or in case of the death of both, or their refusal to act, two other trustees, may revoke such appointment, and grant another appointment to the same or any other person; the instrument of revo-

cation and such new appointment are in like manner to be deposited with the commissioners fourteen days before payment of any sums of money. [This section differs from the 1 Geo. 4. c. 83. s. 4. and 5 Geo. 4. c. 62. s. 4. only in the power of appointment being given to "not less than two trustees," instead of "not more than four."]

XIX. The trustees may at any time (by a draft or order in writing under the hands of any two trustees, attested by two other trustees or managers, or two credible witnesses) require the whole or part of any sum placed to their account in the books of the commissioners, to be paid to their appointed agent: the draft or order must be addressed to the commissioners, and indorsed within five days after its production by their officer, with an order for the payment of the sum mentioned in the draft with interest, addressed to the cashiers of the Bank of England or Ireland, by whom it will be paid. [This section is taken from the 1 Geo. 4. c. 83. s. 6. and 5 Geo. 4. c. 62. s. 6.]

XX. When the sum drawn for exceeds 5000*l.*, the draft or order must be signed by four trustees, and their several signatures attested by different witnesses; and when the sum drawn for, by one or more drafts, exceeds 10,000*l.*, the amount is not to be payable until after fourteen days from the production of the order by the officer of the commissioners. [The first part of this section is the same as 1 Geo. 4. c. 83. s. 14. and 5 Geo. 4. c. 62. s. 12. except that the sum mentioned in those acts was 2000*l.* instead of 5000*l.*, and the latter part is the same as 5 Geo. 4. c. 62. s. 37., except that in that act the sum mentioned was 5000*l.* instead of 10,000*l.* and the time for payment 21 days, instead of 14.]

XXI. The officer of the commissioners is not to issue orders for more than 10,000*l.* for the same bank in any one day. A trustee, (if his identity can be ascertained to the satisfaction of the commissioners or their officer) who executed the appointment of an agent, may receive payment of money required to be paid by an order or draft, as mentioned in the foregoing sections: or if no agent have been appointed, a trustee who did not sign the draft or order, may receive the amount of the same. If, however, an agent have been appointed, the payment so made to a trustee in person, will not operate as a revocation to such appointment, but it will remain in force until revoked by the trustees as above directed. [The first part of this section as to the amount for which the officer of the commissioners may give an order in one day, is new. The rest of the section is nearly the same as the provisions of 1 Geo. 4. c. 83. s. 7. and 5 Geo. 4. c. 62. s. 17.]

XXII. Within six weeks after the 20th of November next, the trustees and managers of the Savings Banks already established are to ascertain the amount of their surplus fund, and, after retaining so much as is necessary for the future management of their respective banks, are to appropriate the remainder according to their respective regulations made before the passing of this Act? or in case no such regulations have been made, then in such manner as the major part of

the trustees at a general meeting shall think proper. [The provisions of this clause are new.]

XXIII. Where the property of any Savings Bank, after the 20th of November next, shall be increased by the interest received, beyond the rate of interest payable to the depositors by the regulations of the Savings Banks, the trustees after deducting expences shall, within six months after the 20th of November in each year, ascertain, certify and pay over to the commissioners the amount of such increased property, reserving enough to meet current expences; and the amount of such surplus shall be discharged from the account of such Savings Banks standing in the commissioners' books, and the commissioners shall keep a separate account of the same, and apply it as any other monies under this Act; provided that it shall be lawful for the trustees to claim and receive, for the purposes of the institution, the whole or any part of such monies. [This section is new.]

XXIV. From the 20th of November in this year the interest payable to depositors by the trustees is not to exceed the rate of 2½d. per cent. per diem. [This clause is new: it will be seen that 2½d. per cent. per diem is payable by the commissioners to the trustees, and only 2½d. by the trustees to the depositors, in other words, the trustees receive 3l. 16s. 0½d. per cent. and the depositors not more than 3l. 8s. 5½d.]

XXV. When minors become depositors, the trustees may pay them their shares and interest, and a receipt from them will be valid, notwithstanding their disability in law to act for themselves. [The same as 67 Geo. 3. c. 105. s. 5. and 57 Geo. 3. c. 130. s. 5.]

XXVI. When deposits are made by married women, without notice that they are married, or when women marry after having made deposits, the trustees may pay money in respect of such deposits to any such women, unless the husband or his representatives give notice of the marriage to the trustees, and require payment to be made to him or them. [This clause is new.]

XXVII. Trustees of charitable societies, or of a charitable donation or bequest for the benefit of the poor, may invest in the funds of any Savings Banks, sums not exceeding 100l. per annum, nor exceeding 300l. in the whole, exclusive of interest. [The 1 Geo. 4. c. 83. s. 12. contained a provision very similar to this, which, however, had been repealed by 5 Geo. 4. c. 62. s. 24.]

XXVIII. Friendly societies, with the consent of the trustees and managers of the Savings Bank, may subscribe any portion of their funds into the funds of such Savings Bank, but if such friendly society was not formed and enrolled before the passing of this act, the sum so subscribed may not exceed 300l. principal and interest included, and when the sum amounts to 300l., such society will not be entitled to any interest at all. [The former part of this clause is the same as 57 Geo. 3. c. 130. s. 6. the latter part restricting the amount that may be subscribed in future is new.]

XXIX. The receipt of the treasurer or other officer of such friendly

society or charitable society, apparently authorised to require payment of money, will be a sufficient discharge for such payment; and the Savings Bank in which the deposit was made will not be liable for misapplication of money so paid, or for want of authority in the person requiring payment. [Nearly the same as 57 Geo. 3. c. 130. s. 6.]

XXX. Members of friendly or charitable societies are not to be liable to forfeiture by subscribing to any institution under this act: nor depositors by being interested in the funds of any friendly or charitable society deposited in any other Savings Bank. [Nearly the same as 57 Geo. 3. c. 105. s. 24. and 57 Geo. 3. c. 130. s. 22.]

XXXI. The regulations in this Act relative to money paid into the Bank of England, and receipts issued on account thereof, and also to the application of such money by the commissioners, are to be applicable to payments made and receipts issued under the "Friendly Societies Act," 59 Geo. 3. c. 128. except with respect to all such friendly societies as were formed and enrolled before the passing of this Act. [This section is taken from 1 Geo. 4. c. 83. s. 18.]

XXXII. All persons subscribing to a Savings Bank must disclose their name, profession, occupation and residence to the trustees, who are required to enter the same in the books of the institution. [This differs from the 5 Geo. 4. c. 62. s. 20. only in requiring the profession and residence to be disclosed as well as the name, and in requiring an entry in the books.]

XXXIII. Persons acting as trustees may subscribe on the behalf of others, whether they are themselves depositors or not, and must make the declaration required to be made by depositors in the next section of this act (34.); such deposits are to be entered in the joint names of the trustee and the *cestui que trust*, and the receipt of the trustee, his executor or administrator, will be a valid discharge to the trustees of the Savings Bank, either with or without the receipt of the *cestui que trust*. [This section is the same as 5 Geo. 4. c. 62. s. 23. except that a depositor might not by that act be a trustee.]

XXXIV. Persons subscribing to one Savings Bank may not subscribe to any other, and on making their first deposit, and at any other time when they shall be so required by the trustees, are to sign a declaration to that effect, which declaration is to be filed and kept by the trustees of every Savings Bank, and in case such declaration is proved to be false, the depositor will forfeit his deposit, and the trustees are required to close his account, and to pay the sum forfeited to the account of the commissioners for the reduction of the national debt: it is provided that in the case of infants under the age of seven years becoming depositors, the declaration is to be made by a person approved or appointed by the trustees of the Savings Bank. A printed notice of the above regulation is to be affixed in the office appointed for receiving deposits. [This section differs from the 5 Geo. 4. c. 62. s. 25. only in providing for the cases of infants under the age of seven years.]

XXXV. From the twentieth of November next, no person will be

allowed to deposit more than 30*l.* in any one year, nor more than 150*l.* in the whole: and whenever the sums standing in the name of any one depositor amount to 200*l.* principal and interest included, no interest will be payable on such deposit, so long as it continues to amount to the sum of 200*l.* [By the 5 Geo. 4. c. 62. s. 21. 30*l.* might be deposited each year, and each depositor might have to the amount of 200*l.* exclusive of interest, and in that act there was no provision stopping the payment of interest to whatever sum the whole might amount.]

XXXVI. The provisions of the preceding section are not to prevent persons, whose deposits at the time of passing this act, amounted to or exceeded 200*l.*, from receiving interest in future.

XXXVII. But the trustees are not to receive additional deposits from any such depositor, so long as his deposit amounts to 150*l.*

XXXVIII. Persons withdrawing their deposits may subscribe again, provided such new deposits do not in any one year exceed the sum of 30*l.* [This section is in effect the same as 5 Geo. 4. c. 62. s. 22.]

XXXIX. Depositors may withdraw the whole of their deposits and interest thereon for the purpose of investing the same in any other Savings Bank; in which case the trustees, or one or more of them, of the Savings Bank from which such deposit is drawn, are required to give the depositor a certificate, attested by the secretary or actuary of such bank, of the amount due to the depositor; on producing this certificate to the trustees of the Savings Bank to which the deposit is intended to be removed, the depositor is to indorse his name thereon, which indorsement is to be attested by one of such trustees or managers; and if such trustee or manager is satisfied of the authenticity of the certificate, the trustees of such Savings Bank may receive the sum specified in the certificate to the account of the person making the deposit, who is, however, to make the declaration required by section 34. of this Act. [This section differs very little from the 5 Geo. 4. c. 62. s. 23., it empowers one trustee or manager only to sign the certificate, and does not require the depositor to subscribe his name to the certificate, but only to indorse it.]

XL. When a depositor dies leaving a sum exceeding 50*l.* in a Savings Bank, probate of his will, or letters of administration must be taken out, before the same can be paid to his legal representative: where the whole estate or effects of a depositor, in respect of which probate or letters of administration are granted, do not exceed 50*l.* no stamp duty will be chargeable; and the person claiming probate or letters of administration free from stamp duty, is to produce a certificate of the amount and value of the depositor's interest, which certificate will be received as evidence thereof. [By the 57 Geo. 3. c. 105. s. 24. and the 57 Geo. 3. c. 130. s. 23. probate or letters of administration must have been taken out if the deposit and interest exceeded 20*l.*]

XLI. Where the whole estate and effects of a depositor do not exceed 50*l.*, the administration bond, and every affidavit or document leading

to or connected with such administration, will be exempt from stamp duty: and where the deposit with interest does not exceed 50*l.*, and the trustees are satisfied that no will was left by the depositor, and that letters of administration will not be taken, they are empowered to divide the same according to the rules of the institution; or if there are no rules, then according to the statute of distributions. [The former part of this section exempting bonds, &c. from stamp duty, is the same as 1 Geo. 4. c. 83. s. 16. and 5 Geo. 4. c. 62. s. 14. except that the sum is altered to *not exceeding*, instead of *under* 50*l.*; the latter part is taken from the 57 Geo. 3. c. 106. s. 26. and the 57 Geo. 3. c. 130. s. 24. the sum being altered from 20*l.* to 50*l.* and leaving it to the discretion of, instead of being compulsory on, the trustees to distribute the amount due to an intestate depositor.]

XLII. Whenever the trustees have paid and divided any sum of money not exceeding 50*l.*, to or amongst the persons appearing to them to be entitled to the same, according to the statute of distributions, or according to the rules of the Savings Bank, such payment will be valid against any person claiming as next of kin to the intestate depositor; such person, however, may still have his remedy for the money so paid against the person who has received it. [The same as 1 Geo. 4. c. 83. s. 17. and 5 Geo. 4. c. 62. s. 19.]

XLIII. So also payments under probates of wills, or letters of administration, will be valid against any other person claiming as lawful representative, whose remedy is only against the person who has received such payment. [Taken from the 57 Geo. 3. c. 106. s. 27. and the 57 Geo. 3. c. 130. s. 25.]

XLIV. Powers of attorney granted by trustees or depositors, for the purposes of this act, are not liable to stamp duty; neither is any draft or order, or any appointment of an agent, or any instrument for the revocation of such appointment, or any other instrument given or made in pursuance of this Act, liable to stamp duty. [The same as the 57 Geo. 3. c. 106. s. 28. and the 57 Geo. 3. c. 130. s. 26.]

XLV. In case of disputes, the matter in dispute is to be referred to two arbitrators, one to be appointed by the trustees or managers, the other by the party with whom the dispute arose; and in case the arbitrators do not agree, then to the barrister appointed by the commissioners, who is to receive a fee of one guinea, and whose determination is to be conclusive without appeal: the submission, award, order, or determination, are not to be liable to any stamp duty. [That part of this section which requires a reference to be made to a barrister is new; the rest is taken from the 57 Geo. 3. c. 106. s. 29. and the 57 Geo. 3. c. 130. s. 27.]

XLVI. The trustees of Savings Banks are to prepare annually a statement of their funds invested in the names of the commissioners for the reduction of the national debt, shewing the balance due to the depositors, the expences incurred, and in whose hands such balance is then remaining; such statement is to be attested by two managers or

trustees, and countersigned by the secretary or actuary, and transmitted to the commissioners for the reduction of the national debt, within six weeks after the 20th of November in each year. If the trustees neglect to deliver such accounts, or to obey any orders of the commissioners, the commissioners may close their accounts; but on the trustees complying with their orders, the commissioners may re-open their accounts, and allow them the growing interest during the period of the discontinuance. [This section is nearly the same as 6 Geo. 4. c. 62. s. 29.]

XLVII. A duplicate of such annual statement, accompanied with a list of the trustees and managers, is to be affixed in the office of the Savings Bank: and every depositor is entitled to receive a printed copy of the same on payment of one penny. [The provision allowing a depositor to demand a printed copy of the annual statement is new; the rest of this section is taken from the 5 Geo. 4. c. 62. s. 30.]

XLVIII. The commissioners are annually to lay before Parliament on the 25th of March, accounts made up to the 20th of November preceding, of sums received and credited, including interest, and of sums paid, including interest, &c. from the 6th of August 1817, by the said commissioners, on account of any Savings Banks or friendly society, and also an account of all expences incurred by the said commissioners for salaries of clerks or other incidental expences during the preceding year. [Nearly the same as 5 Geo. 4. c. 62. s. 32.]

XLIX. In order that the accounts of the Savings Banks may be uniform with the accounts of the commissioners for the reduction of the national debt, it is enacted that from the 20th of November next, the interest due to each depositor is to be computed to the 20th of May, and 20th of November, half yearly or yearly. [This section is the same as the 5 Geo. 4. c. 62. s. 31.]

L. The commissioners may lay out the whole or any part of the monies belonging to Savings Banks in the purchase of exchequer bills; and will be entitled to receive for all sums so laid out, such an amount of 3 per cent. consols, as the said sums would have bought, had they been applied to the purchase of 3 per cent. annuities, the amount of such annuities to be estimated at the quarterly average price of 3 per cent. annuities which shall have been purchased by the sinking fund in the same quarter of the year. [This section is new.]

LI. The comptroller-general is to certify to the treasury quarterly the amount of principal and interest paid for such exchequer bills, and the amount of 3 per cent. annuities which might have been purchased with such principal and interest in that quarter of the year; and thereupon the lords commissioners of the treasury are to order the bank of England to direct their accountant to place the amount of the 3 per cent. consols contained in such certificate, to the credit of the commissioners, under the title of "The Fund for the Banks for Savings." [This section is new.]

LII. The 3 per cent. annuities created by the purchase of exchequer

bills under this act, are to be chargeable upon the consolidated fund. [This section is new.]

LIII. The commissioners may deliver up the exchequer bills purchased under the provisions of this Act, within five days after the expiration of the quarter in which they were purchased to the paymasters of exchequer bills, by whom they will be cancelled; or the commissioners may exchange any part of such exchequer bills, for new bills of the like amount. [This section is new.]

LIV. The commissioners may sell any part of the annuities standing in their names in pursuance of this act, and apply the money produced by such sale in the purchase of exchequer bills. [This section is new.]

LV. The treasury on application from the commissioners for the reduction of the national debt, may issue exchequer bills for the payment of Savings Banks. [The same as 5 Geo. 4. c. 62. s. 33.]

LVI. And the banks of England or Ireland may make advances to the commissioners for the reduction of the national debt, upon such exchequer bills. [The same as 5 Geo. 4. c. 62. s. 34.]

LVII. This section is the same as 5 Geo. 4. c. 62. s. 35, 36., and merely directs in what way the sums advanced on exchequer bills to the commissioners for the reduction of the national debt by the banks of England or Ireland, shall be paid; its length prevents us from giving an intelligible and concise abstract of it.

LVIII. The commissioners, in order to provide for the payment of drafts drawn upon them by the trustees for Savings Banks in Ireland, may keep a balance in the bank of England, placed to their credit in account with the bank of Ireland. [This section is new.]

LIX. Receipts, orders, certificates, &c. required by this Act, are to be made in the form directed or approved by the commissioners for the reduction of the national debt. [The same as 5 Geo. 4. c. 62. s. 38.]

LX. This Act is declared to be an indemnity to the commissioners for the reduction of the national debt, and to the governor and company of the banks of England and Ireland, for all things done pursuant to this Act. [The same as 5 Geo. 4. c. 62. s. 39.]

LXI. The commissioners are authorised to appoint a barrister at law, and to employ clerks and other officers for the purposes of this Act; and the treasury may settle and pay the allowances of such clerks, and discharge incidental expences. This section is taken from the 1 Geo. 2. c. 83. s. 19.]

LXII. This Act is to extend to all Savings Banks established or to be established in England and Ireland, and to be deemed a public Act, and judicially noticed as such, being specially shewn or pleaded.



## ABSTRACT OF PUBLIC GENERAL STATUTES.

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N. B.—In our first number we abstracted all the statutes passed during the last session and in print when our abstract was formed (down to c. 22. inclusive). All the remaining statutes (of 9 Geo. 4.) are included in the following abstract. As before, we have given merely the titles of the comparatively unimportant enactments (which at any rate will serve to show in what matters alterations have been made, and thus form a guide and warning to practitioners), reserving as much space as possible for full abstracts of statutes the operation of which must be generally felt.

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**CAP. 23.**—An Act to enable Bankers in England to issue certain unstamped Promissory Notes and Bills of Exchange, upon Payment of a Composition in lieu of the Stamp Duties thereon.

[19th June 1828.]

**CAP. 24.**—An Act to repeal certain Acts, and to consolidate and amend the Laws relating to Bills of Exchange, and Promissory Notes in Ireland.

[19th June 1828.]

**CAP. 25.**—An Act to authorize the Appointment of Persons to act as Solicitors on behalf of his Majesty, in any Court or Jurisdiction in Revenue Matters.

[19th June 1828.]

Persons appointed to be solicitors or attornies on behalf of his Majesty, under the orders of the commissioners of the treasury, customs, excise, or stamps, or under the orders of any commissioners or other persons having the management of any other branch of his Majesty's revenue, may act as such in all courts or jurisdictions in the United Kingdom; s. 1. and will be indemnified for acting as such; and proceedings against them for any thing done under such appointment may be stayed, in a summary way, on application to the court in which such proceedings have been commenced, s. 2.

**CAP. 26.**—An Act to regulate the Office of Keeper of the General Register of Hornings and Inhibitions in Scotland.

[19th June 1828.]

**CAP. 27.**—An Act to repeal the Allowances made to Stationers on the purchase of Stamps for Receipts at the Head Office in London, and to grant an Allowance to Persons purchasing such Stamps to a certain Amount of the Commissioners of Stamps, or of the Distributors of Stamps in Great Britain.

[19th June 1828.]

**CAP. 28.**—An Act to enlarge the Powers granted to his late Majesty, under an Act passed in the Fifty-seventh Year of his late Majesty, to enable his Majesty to recompence the service of persons holding, or who have held certain high and efficient Civil Offices.

[19th June 1828.]

**CAP. 29.—An Act to authorize additional Circuit Courts of Justiciary to be held, and to facilitate Criminal Trials in Scotland.**

[19th June 1828.]

**CAP. 30.—An Act for applying surplus Ways and Means, to the service of the Year One thousand eight hundred and twenty-eight.**

[19th June 1828.]

**CAP. 31.—An Act for consolidating and amending the Statutes in England, relative to Offences against the person.**

[27th June 1828.]

The substance of this Act will be found in our last number, p. 129—141.

**CAP. 32.—An Act for amending the Law of Evidence in certain Cases.**

[27th June 1828.]

Quakers or Moravians required to give evidence in any case, civil or criminal, may instead of an oath, make their solemn affirmation, which will have the same effect as if they had taken an oath in the usual form; any person making such affirmation, being convicted of having affirmed anything which, if the same had been upon oath, would have amounted to perjury, will be subject to the same punishment to which persons convicted of perjury, are or shall be subject, s. 1.

On any prosecution for perjury, no person shall be deemed an incompetent witness in support of such prosecution, on account of any interest which such person may have in respect of the instrument forged, s. 2. Every punishment for felony, which is not a capital felony, after it has been endorsed, shall have the effect of a pardon under the great seal; provided however, that nothing contained in this Act, shall prevent or mitigate any punishment for a subsequent offence. s. 3. No misdemeanor (except perjury or subornation of perjury) shall render a party an incompetent witness in any proceeding, civil, or criminal, after he has undergone the punishment. s. 4.

**CAP. 33.—An Act to declare and settle the Law, respecting the Liability of the Real Estates of British subjects and others, situate within the Jurisdiction of his Majesty's Supreme Courts in India, as Assets in the Hands of Executors and Administrators, to the Payment of the Debts of their deceased Owners.**

[27th June 1828.]

**CAP. 34.—An Act for altering and amending an Act, passed in the Fifty-fifth Year of the Reign of his late Majesty, intituled "An Act to regulate Madhouses in Scotland."**

[27th June 1828.]

**CAP. 35.—An Act to protect purchasers for valuable Consideration in Ireland against Judgments, not relieved or re-docketed within a limited time.**

[27th June 1828.]

**CAP. 36.—An Act for continuing to his Majesty for One Year, certain Duties on Sugar imported into the United Kingdom, for the service of the Year One thousand eight hundred and twenty-eight.**

[27th June 1828.]

**CAP. 37.**—An Act to amend an Act of the First and Second Years of his present Majesty, for preventing Depredations within the Jurisdiction of the Cinque Ports, and for the Adjustment of Salvage; and for giving further Powers to the Deputy Warden of the Cinque Ports, and Lieutenant of Dover Castle. [27th June 1828.]

**CAP. 38.**—An Act for rectifying Mistakes in the Names of the Land Tax Commissioners, and for appointing additional Commissioners, and indemnifying such Persons as have acted without due Authority in the Execution of the Acts therein recited. [27th June 1828.]

**CAP. 39.**—An Act for the preservation of the Salmon Fisheries in Scotland. [15th July 1828.]

**CAP. 40.**—An Act to amend the Laws for the Erection and Regulation of County Lunatic Asylums, and more effectually to provide for the Care and Maintenance of Pauper and Criminal Lunatics in England. [15th July 1828.]

The following Acts are repealed; 17 Geo. 2. c. 5. s. 20 and 21., 48 Geo. 3. c. 96., 51 Geo. 3. c. 79., 55 Geo. 3. c. 46., 56 Geo. 3. c. 117., 59 Geo. 3. c. 127., 5 Geo. 4. c. 71. see s. 1.

It shall be lawful for the major part of the justices present at general quarter sessions, in every county to direct notice to be given in a public newspaper of their intention to take into consideration at the next sessions, the expediency of providing a county lunatic asylum. s. 2. If at the next quarter sessions they shall deem it expedient to do so, they may appoint a committee of visiting justices to superintend the erection of a lunatic asylum. s. 3. Or they may appoint a committee to treat with a committee of adjacent counties, or with a committee of subscribers to asylums, maintained by voluntary contributions, respecting the uniting with them for such purpose. s. 4. It shall be lawful for the major part of the subscribers to any lunatic asylum, to appoint a committee not exceeding five in number, to enter into an agreement with the committee of justices for the purposes of this Act. s. 5. Where the committees appointed to treat for two or more counties shall think fit to unite for the purposes of this Act, they shall enter into an agreement in the form directed by this Act, which agreement, when signed by the major part of each committee shall be binding on both counties. s. 6. The committee shall report such agreement to the next general quarter sessions for each county, and such agreement shall not be valid unless approved of at such sessions. s. 7. In counties in which lunatic asylums have been already provided, under any former Act of Parliament, or in which one shall hereafter be provided, it shall be lawful in the former case for the justices present at the quarter sessions, next after the passing of this Act, in the latter case, for the justices present at the Michaelmas general quarter sessions in each year, and for the major part of the subscribers to any lunatic asylum erected by voluntary contributions, to elect a committee of visitors to act together for the providing and managing such county lunatic asylum; in case of vacancy

in such committee by death or resignation, the same may be filled up at any general quarter sessions, or at any general meeting of subscribers respectively; the number of visitors for each county shall be in proportion to the share of expences charged upon the county for which they shall act, but not less than seven shall be appointed for any county, and the number of the committee of subscribers shall be in the proportion specified in the agreement, between the county and the subscribers.

s. 8. If an appointment is not made, or a vacancy not filled up, the visitors continuing to act shall be deemed the committee. s. 9. The visitors so appointed are authorised to meet from time to time, to appoint a clerk and surveyor for exercising the powers of this Act, to contract for the purchase of lands and buildings, and for building, altering, and completing such lunatic asylum; the contractor shall give sufficient security for the performance of his contract to the clerk; and all contracts shall be entered in a book to be kept by the clerk; all buildings and land contracted for, and purchased shall be conveyed to such persons as the visitors shall think fit, in trust for the uses and purposes of this Act; and the visitors shall make their report to the general quarter sessions of the county. s. 10. No visitor shall be concerned in contracts, either in his own name, or in the name of any other person in trust for him. s. 11. The justices at their general or quarter sessions shall make a county rate, or rates to defray the necessary expences. s. 12. When it shall appear from the report of the visitors, that the costs will exceed one half of the amount of the ordinary annual assignment for the county rate, calculated on the average of the last five years, the justices in quarter sessions may borrow money upon mortgage, to be secured on the county rates; and the holder of such security is empowered to transfer the same by indorsement. s. 13. The rates to be raised upon the county, are not only to be charged with the interest of the money borrowed, but also with the payment of a further sum, equal at least with the sum so charged for the interest, to be applied in discharge of the interest and principal: a person is to be appointed at the sessions to keep an account of receipts and payment, and such person is to deliver such account to the justices at the Michaelmas quarter sessions, for the inspection of the justices who shall make orders for carrying this Act into execution, and in case the person so appointed shall neglect such order, and shall not duly apply the money in his hands to the purposes directed by this Act, he shall forfeit double the amount of the money not so applied, to be recovered by distress and sale of his goods, by warrant under the hands and seals of such justices: the justices at a day and hour fixed at the sessions, shall in open court cause all the securities to be drawn by lots, and numbered for payment, and the securities so drawn shall be discharged in succession, according to the priority of the number drawn. s. 14. The justices at sessions may direct tenants at rack rent to deduct one half of the rates from their rent. s. 15. The justices at their general or quarter sessions shall make provision for paying the money

borrowed within a limited time, not exceeding fourteen years from the time of borrowing. s. 16. Bodies politic and corporate, guardians, committees, husbands, trustees, and attornies may convey houses, buildings, &c. for the purposes of this Act. s. 17. The money to be paid for the purchase of land, &c. under the preceding section shall (in case it exceeds 100*l.*) as soon as conveniently may be, be laid out in the purchase of lands in fee simple, to be conveyed to the same uses as the land sold: in the meantime such money, whether it exceeds 100*l.* or not shall be laid in government securities in the names of two persons, one to be nominated by the party for the time being interested therein, the other by the visitors, and the interest arising therefrom shall be paid to the person entitled to the rents and profits of the lands sold. s. 18. In case the contractor shall not make out a good title, or shall refuse to convey, or cannot be found, the purchase money shall be paid into the Bank of England. s. 19. If the person entitled to lands, &c. cannot be found, or shall refuse to execute a conveyance thereof, upon payment of the money into the Bank of England for the use of such person, such lands, &c. shall vest in the clerk of the peace, and his successors in office, of the county, freed of all claims, and shall and may be thereupon employed for the purposes of this Act. s. 20. Where any question shall arise touching the title to any money to be paid into the Bank of England in pursuance of this Act, for the purchase of any houses, lands, &c. the person in possession at the time of the purchase shall be deemed entitled, unless the contrary be shown. s. 21. When money shall be paid into the Bank of England, to be applied to the purchase of other lands to be settled to the like uses, the court of Exchequer may order the reasonable expences of the purchase to be paid by the treasurer of the county, and charged to the county rate. s. 22. The money to be paid pursuant to any agreement as aforesaid, shall be paid or tendered before the visitors shall proceed to take possession, or make any use of the lands, &c. s. 23. The commissioners of Woods and Forests, with the consent of the treasury, &c. may grant sites for building a county lunatic asylum. s. 24. The visitors may purchase lands notwithstanding the statutes of mortmain. s. 25. The justices at any quarter sessions may limit the sums to be expended in the purchase of lands or houses, or in erecting or altering buildings for the purposes of this case; and the visitors shall not enter into any contract at a sum exceeding the sum limited; and no such contract shall be valid or legal. s. 26. The visitors, with the consent of the justices at sessions may rent houses, lands, &c. for a lunatic asylum, but the grant or demise of such lands, &c. shall contain a power for the purchase of the fee simple, at not more than thirty years' purchase of the rent renewed. s. 27. If a county asylum shall be situate in any other county, the justices of the county to which it belongs, shall have power to act therein. s. 28. Lands purchased for a lunatic asylum shall not be assessed to the rates at a higher value than the same land was at the time of the purchase; nor shall any buildings erected thereon be assessed

to any house or window tax. s. 29. The visitors shall make regulations for the management of the asylum, and appoint officers and servants, and shall from time to time fix a weekly rate, not exceeding 14s. to be paid for each person confined in the asylum; and the said visitors shall annually audit the accounts of the treasurer, and report the same to the next general quarter sessions. s. 30. If the rate of 14s. shall be found insufficient, the justices at sessions may make an order to increase it, and such additional rate shall be paid by the overseers of the poor of the parish to which the insane persons in the asylum respectively belong. s. 31. A chaplain shall be appointed for every county lunatic asylum. s. 32. The visitors may order all necessary repairs and expences, and shall direct the same to be paid by an order on the county treasurer, or where two are united shall apportion the same, and make an order on the treasurer of each county; the treasurer shall discharge the same under penalty of double the sum, to be recovered by action for the benefit of the asylum; no order shall be made unless notice of the meeting shall have been previously given, nor unless the major part, not being fewer than three, of the visitors present concur. s. 33. Where it is necessary that there should be a meeting earlier than the period appointed for the next meeting, the clerk by giving ten days' notice to each member of the committee, may convene one. s. 34. The visitors may sue and be sued in the name of their clerk, whose death or removal shall not abate actions. s. 35. The justices at petty sessions, next after the 15th of August in each year shall issue warrants to the overseers of the poor of the parishes within their subdivisions, to return lists of insane persons chargeable to their respective parishes, and the overseers shall prepare such lists, verified on oath, and transmit the same to the clerk of the peace for the county, accompanied with a medical certificate of the condition of each patient; any overseer neglecting the above shall be subject to a fine not exceeding 10l. s. 36. If any overseer of the parish to which any shall be chargeable, shall for seven days wilfully neglect to give information of the state of such person to some justice acting for the division, he shall for every offence forfeit not exceeding 10l., nor less than 40s. s. 37. When any poor person is deemed to be insane, one justice may require the overseer to bring such person before two justices, who are required to call in medical assistance, and if they shall be satisfied on examination, that such person is insane, they shall cause him to be sent to the lunatic asylum; and it shall be lawful for them to make an order on the overseer of the parish to which such person is chargeable, for the payment of the charges of conveying and maintaining such person, and the overseer of the said parish shall not remove such insane person, unless he shall have been discharged as cured; provided that the overseer conveying such person to the asylum, shall deliver to the keeper of the asylum a certificate of the examination. s. 38. The visitors may deliver any pauper to his relatives or friends upon their undertaking that he shall be no longer chargeable. s. 39. Medical practi-

tioners, appointed by the parish, shall, with the consent of the overseer, have liberty eight times in the year to visit pauper patients confined in any public hospital, lunatic asylum, &c. s. 40. Where the legal settlement of lunatics cannot be discovered, the justices may send them to the asylum, or other place of confinement for the county where found. s. 41. Where the settlement of a lunatic, confined in an asylum, has not been ascertained, two justices may enquire respecting the same, and if satisfied may make order for the payment of expences incurred within twelve months previous to the date of the order. s. 42. Where two counties jointly maintain an asylum, two justices of the county, in which the asylum is situate, may make orders upon overseers of the other county. s. 43. If persons are wandering about, and deemed to be insane, although not chargeable, justices may proceed as in the case of persons chargeable, and make order for maintenance; provided that if it shall appear that the estate of the insane person shall be sufficient, the justices shall by order under their hands and seals, direct the overseers or churchwardens of the parish, where such estate shall be, to levy so much as is necessary to pay the charges of removal, maintenance, &c. s. 44. If any justice shall refuse to make an order for the conveyance of any insane person to an asylum, he shall deliver his reasons in writing. s. 45. Persons aggrieved may appeal to the quarter sessions, having given ten days' notice to the justice or justices of his intention to appeal. s. 46. Justices shall make a return to the quarter sessions of the cases brought before them. s. 47. Sums directed to be paid by overseers, shall be levied by distress, if not paid within twenty days after notice of the order. s. 48. Bastards of lunatics born in an asylum shall have the settlement of the mother. s. 49. Lunatic asylums shall not be liable to the reception of lunatics, chargeable to any place which does not contribute to the expence of such asylums. s. 50. When any asylum can accommodate more lunatics, the visitors may make an order for the admission of the others belonging to any other county or place not contributing to the expences of the asylum, under the conditions following: — no such patient shall be admitted without an order signed by one visitor, directed to the superintendent of the asylum, nor without a medical certificate of the insanity of the patient, nor without an undertaking signed by two substantial householders, or by the minister and one churchwarden or overseer of the parish, for the payment of all expences; provided that the weekly provision for the maintenance of patients not being paupers shall be fixed by the visitors. s. 50. Officers in the asylum, through neglect or connivance, suffering lunatics to go at large without an order from the visitors, shall for each offence forfeit not more than 40*l.* nor less than 40*s.* s. 52. The expences of the removals of paupers from asylums shall be paid by the parish to which the pauper belongs. s. 53. Where parties charged with offences are insane, two justices may inquire into their settlement, and make an order for their maintenance; or if the settlement cannot be ascertained, may make an order upon the treasurer of the county;

but if it shall appear that such insane person is possessed of sufficient property, the justices shall order the same to be applied in payment of the expences: the churchwardens and overseers of the parish in which the justices shall adjudge such person to be settled, may appeal to the sessions against any order of removal, giving reasonable notice thereof to the clerk of the peace for the county, who shall be respondent in such appeal. s. 54. Persons convicted of offences becoming insane during imprisonment, may be removed to a county lunatic asylum, by warrant under the hand of a secretary of state. s. 55. The visitors of county asylums shall yearly prepare a report of the patients confined therein, and a transcript thereof shall be sent to the Secretary of State for the Home Department, and to the clerk of the commissioners under the 9 Geo. 4. c. 41. intituled, "An Act to regulate the care and treatment of insane persons in England." s. 56. The Secretary of State for the Home Department may employ any person to inspect any county lunatic asylum. s. 57. Nothing in this Act shall extend to the royal hospital of Bethlem. s. 58. The next section points out the steps to be taken for the recovery of penalties under this Act. s. 59. Any person aggrieved by any order or judgment made or given in pursuance of this Act, may within four months appeal to the general or quarter sessions, on giving fourteen days' clear notice thereof to the person appealed against, and in forthwith entering into a recognizance, with two sureties, to try such appeal, and abide the order of the court thereupon. s. 60. The next section provides for the interpretation of certain words in this Act. s. 61. This Act to commence August 1, 1828. s. 62.

CAP. 41.—An Act to regulate the Care and Treatment of Insane Persons in England. [15th July, 1828.]

CAP. 42.—An Act to abolish Church Briefs, and to provide for the better Collection and Application of Voluntary Contributions, for the purpose of enlarging and building Churches and Chapels. [15th July, 1828.]

CAP. 43.—An Act for the better Regulation of Divisions in the several Counties of England and Wales. [15th July, 1828.]

CAP. 44.—An Act to provide for the Execution throughout the United Kingdom of the several Laws of Excise, relating to Licences and Surveying, Tea, Coffee, Cocoa, Pepper, Tobacco, Snuff, Foreign and Colonial Spirits and Wine, notwithstanding the Transfer to the Customs of the Import Duties on any such Commodities. [15th July, 1828.]

CAP. 45.—An Act to amend and to make perpetual, and to extend to the whole of the United Kingdom, certain Provisions contained in several Acts for regulating the Rectification, compounding, dealing in, or retailing of Spirits, and for preventing private Distillation in Scotland; and to provide for the payment of the Duty on Malt used in making of Spirits from Malt only. [15th July, 1828.]



CAP. 46.—An Act to enable certain Hotel-keepers to be licenced to keep Hotels as common Inns, Alehouses, and Victualling Houses, and to sell therein Beer and other Exciseable Liquors, for the residue of the present year. [15th July, 1828.]

CAP. 47.—An Act for regulating the Retail of Exciseable Articles and Commodities to Passengers on board of Passage Vessels from one part to another of the United Kingdom. [15th July, 1828.]

CAP. 48.—An Act to repeal the Excise Duties and Drawbacks on Plate Glass, Broad Glass, Crown Glass, Bottle Glass, and Glass Bottles, payable in Great Britain and Ireland respectively, and to impose other Duties and to grant other Drawbacks in lieu thereof, throughout the United Kingdom; and to make perpetual, and to extend to the United Kingdom, several Acts relating to certain Duties on Glass. [15th July, 1828.]

CAP. 49.—An Act to amend the Law in force relating to the Stamp Duties on Sea Insurances, on Articles of Clerkship, on Certificates of Writers to the Signet, and of Conveyancers and others, on Licences to Dealers in Gold and Silver Plate, and Pawnbrokers, on Drafts on Bankers, and on Licences for Stage Coaches in Great Britain; and on Receipts in Ireland. [15th July, 1828.]

*Note.*—The importance of the laws relating to stamps will induce us to make this the subject of an Article in a future number; we therefore think it unnecessary to particularize the provisions of this Act in our present number.

CAP. 50.—An Act for regulating the Appropriation of certain unclaimed Shares of Prize Money acquired by Soldiers or Seamen in the Service of the East India Company. [15th July, 1828.]

CAP. 51.—An Act to alter and amend an Act for enabling his Majesty to grant to a Company to be incorporated by Charter, to be called "The Canada Company," certain Lands in the Province of Upper Canada. [15th July, 1828.]

CAP. 52.—An Act for erecting a Chapel of Ease in "Killiney," in the Parish of "Mankstown," in the County and Diocese of Dublin, and for providing for the due Celebration of Divine Service therein. [15th July, 1828.]

CAP. 53.—An Act to repeal several Acts and Parts of Acts in force in Ireland, relating to Bail in Cases of Felony, and to certain Proceedings in Criminal Cases, and to the Benefit of Clergy, and to Larceny and other Offences connected therewith, and to malicious Injuries to Property. [15th July, 1828.]

CAP. 54.—An Act for improving the Administration of Justice in Criminal Cases in Ireland. [15th July, 1828.]

CAP. 55.—An Act for consolidating and amending the Laws in Ireland relative to Larceny and other offences connected therewith. [15th July, 1828.]

**CAP. 56.**—An Act for consolidating and amending the Laws in Ireland relative to malicious Injuries to Property. [15th July, 1828.]

*Note.*—We shall notice the alterations in the Criminal Law in Ireland on a future occasion.

**CAP. 57.**—An Act to provide for the Regulation of the Public Office for registering Memorials of Deeds, Conveyances, and Wills in Ireland. [15th July, 1828.]

**CAP. 58.**—An Act to regulate the Granting of Certificates by Justices of the Peace and Magistrates, authorizing persons to keep Common Inns, Alehouses, and Victualling Houses in Scotland, in which Ale, Beer, Spirits, Wine, and other exciseable Liquors may be sold by retail under Excise Licences; and for the better regulation of such Houses; and for the prevention of Houses being kept without such Certificate. [15th July, 1828.]

**CAP. 59.**—An Act to regulate the Mode of taking the Poll at the Election of Members to serve in Parliament for Cities, Boroughs, and Ports in England and Wales. [15th July, 1828.]

At every election of a member to serve in parliament for any city, borough, town, or port in England or Wales, where the electors shall exceed 600, if more candidates than the number to be returned shall be put in nomination, and a poll demanded, the returning officer shall, on the requisition of any candidate or his agent, in writing, divide the polling-place into compartments, so that, as nearly as can be calculated, there shall be a compartment for every 600 voters; and to each compartment the returning officer shall appoint a clerk to take the poll, &c., and such clerk shall receive not exceeding one guinea per day. s. 1. The expences of providing booths or polling-places, and of paying poll-clerks, shall be defrayed by the candidates in equal portions; but if a person nominated as candidate shall not express his assent thereto before proclamation of the return is made, the person nominating such candidate shall pay his proportion of the expences. s. 2. The returning officer or his assessor shall attend to decide a disputed vote, but objections to votes shall not delay the votes. s. 3. So much of the 25th Geo. 3. c. 84. s. 1. as limits the duration of polls for any city, borough, town, or port in England, or for the town of Berwick-upon-Tweed, shall be repealed. s. 4. The poll for any city, borough, town, or port in England shall not continue longer than eight days, and shall be finally closed at or before three of the clock in the afternoon of such eighth day. s. 5. The returning officer shall not make proclamation of the return until he has decided on doubtful votes; provided that if no decision shall have been made at three o'clock of the third day after the close of the poll, the returning officer shall, notwithstanding, proceed to proclaim the return. s. 6. This Act shall not extend to Scotland, Ireland, London, or Westminster. s. 7.

**CAP. 60.**—An Act to amend the Laws relating to the Importation of Corn.  
[15th July, 1828.]

**CAP. 61.**—An Act to regulate the granting of Licences to Keepers of Inns, Alehouses, and Victualling Houses in England.  
[15th July, 1828.]

In every division of every county in England there shall be annually holden a special session of justices for the purpose of granting licences to persons keeping or about to keep inns, alehouses, and victualling houses to sell exciseable liquors to be consumed on the premises; such meeting shall be holden in Middlesex and Surrey within the first ten days of March, and in other counties between the 20th of August and the 14th of September; and it shall be lawful for the justices at such meeting to grant licences for the purposes aforesaid to such persons as they shall deem fit and proper. s. 1. Twenty-one days at least before such meeting, a petty session of justices shall be holden, who shall, by a precept under their hands, appoint the day, hour, and place of such meeting, and shall direct such precept to the high constable of the division, requiring him within five days to order the petty constable to affix a notice of the same on the door of the church or chapel, and to deliver to each justice for the division, and to each person keeping an inn, or who shall have given notice of his intention to keep an inn, a copy of such notice. s. 2. The justices shall adjourn such annual meeting to a future day, and such adjournment shall not be holden within five days of such annual meeting, but within the months of March, in Middlesex and Surry, and of August and September in other counties. s. 3. At such general meeting not less than four nor more than eight special sessions shall be appointed for transferring licences in each year. s. 4. Similar notice as that required in s. 2. shall be given of the adjournment of the general meeting and of the special sessions. s. 5. No justice who shall himself be, or shall be in partnership with, a common brewer, distiller, maker of malt for sale, or retailer of malt, or any exciseable liquor, or who shall be owner, manager, or agent of a house about to be licensed, or who shall be by blood or marriage the father, son, or brother, or partner in any other trade of any brewer, distiller, &c., to whom the house about to be licensed shall in the whole or in part belong, shall act; every justice offending herein shall forfeit 100*l.*; but a justice who is a trustee of such house shall not be disqualified. s. 6. When in liberties, &c. two justices not disqualified do not attend, the county justices may act. s. 7. The powers hereby given to the justices of the county shall not extend to the cinque ports. s. 8. Questions respecting licences shall be determined, and licences granted shall be signed, by the majority of the justices, not disqualified, present at the meetings. s. 9. A notice of application for a licence to keep a house as an inn, not previously kept as such, must be fixed on the door of the house and of the church on the three several Sundays, between the first day of

January and the last day of February in Middlesex and Surrey, and in other counties, between the first of June and last of July, between ten and four in the day, and a copy of such notice shall be served on one of the overseers and on one of the constables of the parish, s. 10. Every person desirous to transfer a licence shall, five days before the special session, serve a notice of his intention on one overseer and one constable. s. 11. Any person hindered by sickness or other sufficient cause from attending any licensing meeting, may authorise another person to attend for him. s. 12. Every licence shall be in the form pointed out in the schedule of this act, and shall be in force for one year from the 5th of April in Middlesex and Surrey, and in other counties, from the 10th of October. s. 13. The next section provides, that in case of death, change of occupancy, or other contingency, the justices may grant a licence to the heirs, executors, assignees, &c. of such person, to continue to the 5th of April, or 10th of October following, as the case may be; in such case the person applying for the licence shall affix a notice on the door of the house and on the church, some one Sunday within six weeks before the special session, and shall serve a copy thereof on one overseer and one constable. s. 14. The clerk of the justices may demand the sum of 7s. 6d. for all expences; and every clerk demanding or taking more shall forfeit 5l. s. 15. No sheriff's officer or officer executing the legal process of any court of justice shall be capable of receiving or using any licence under this act. s. 16. No excise licence shall be granted to any person by the commissioners of excise, except to a person licensed under this act. s. 17. Every person selling exciseable liquor by retail without licence, shall for every offence, on conviction before one justice, forfeit not exceeding 20l. nor less than 5l. s. 18. Licensed persons shall use the standard measures in the sale of liquors, under a penalty of not more than 40s. to be recovered within 30 days on conviction before one justice. s. 19. In cases of riot, &c. any two justices may order licensed houses within their jurisdiction to be closed. s. 20. Every person licensed under this act convicted before any two justices of any offence against the tenor of his license, shall, for the first offence, forfeit not more than 5l., for the second offence not more than 10l., and for the third offence not more than 50l., in which latter case the charge shall be adjourned to the next special session or annual meeting: provided that the justices may, or if the person charged shall in writing request them so to do, they shall adjourn the hearing of such charge to the next general or quarter sessions, there to be tried by a jury; and in case of a verdict of guilty, such offender may be fined not more than 100l., and his licence declared void, in which latter case he shall be deemed incapable of selling exciseable liquors by retail for the space of three years. s. 21. Where the case is adjourned to the general or quarter sessions, and no fit person shall appear to prosecute, the justices may order the charge to be carried on by the petty constable of the parish, and order the expences of the prosecution to be charged on the county

rates. s. 22. Persons summoned as witnesses, and not attending or refusing to give evidence, shall forfeit not more than 10*l*. s. 23. Every penalty imposed by this act on a justice may be sued for by action of debt in any of his Majesty's courts of record at Westminster. s. 24. Penalties imposed by justices may be levied by distress; and if there are not sufficient goods, the justice may commit the offender to the house of correction for not more than one month, if the penalty shall not exceed 5*l*., or for three months if between 5*l*. and 10*l*., or for six months if above 10*l*., provided that the offender shall be discharged on payment of the penalty and costs. s. 25. The justice may order not more than one moiety of the penalty to the prosecutor, and the remainder to the treasurer of the county. s. 26. Any person aggrieved may appeal to the next general or quarter sessions. s. 27. In case of notice of appeal being given, the justice may bind parties to appear to give evidence. s. 28. In cases of appeal the court may adjudge costs. s. 29. Actions against justices shall be commenced within three calendar months; and such justice may plead the general issue, and give the special matter in evidence. s. 30. Every conviction under this act to be on the oath of one or more credible witnesses. s. 31. S. 32. gives a general form of conviction. The justice shall return every conviction to the next general or quarter sessions, to be filed of record. s. 33. No writ of certiorari shall be allowed. s. 34. S. 35. repeals all prior acts on this subject. This act shall not affect the universities of Oxford and Cambridge, nor alter the time of licensing in London, nor any law of excise, nor to prohibit the sale of beer at fairs as heretofore allowed. s. 36. The last section provides for the interpretation of words in this act. s. 37.

**CAP. 62.**—An Act for the Regulation of the Linen and Hempen Manufactures of Ireland. [15th July, 1828.]

**CAP. 63.**—An Act to amend the two Acts of the Third and Fifth Years of his present Majesty, for the Appointment of Constables in Ireland. [15th July, 1828.]

**CAP. 64.**—An Act to extend the Jurisdiction of the Commissioners acting in the Execution of two Acts for paving and regulating the Regent's Park, together with the New Street, from thence to Pall Mall, and to amend the said Acts. [15th July, 1828.]

*Note.*—The two acts referred to, are 5 Geo. 4. c. 100., and 6 Geo. 4. c. 38.

**CAP. 65.**—An Act to restrain the Negotiation, in England, of Promissory Notes and Bills under a limited sum, issued in Scotland or Ireland. [15th July, 1828.]

**CAP. 66.**—An Act for repealing the Laws now in force relating to the discovery of the Longitude at Sea. [15th July, 1828.]

**CAP. 67.**—An Act to defray the charge of the Pay, Clothing, and contingent and other Expences of the 'disembodied Militia in Great Britain and Ireland, and to grant Allowances in certain Cases to Subaltern Officers, Adjutants, Quartermasters, Surgeons, Mates, and Serjeant Majors of the Militia, until the twenty-fifth day of March, one thousand eight hundred and twenty-nine. [19th July, 1828.]

**CAP. 68.**—An Act to amend an Act of the Fifth Year of his present Majesty for amending the Laws of Excise relating to Retail Brewers. [19th July, 1828.]

**CAP. 69.**—An Act for the more effectual prevention of Persons going armed at Night for the Destruction of Game. [19th July, 1828.]

The 57 Geo. 3. c. 90. is repealed: every person unlawfully taking or destroying game by night shall, upon conviction before two justices, be committed for the first offence for not more than three months, and shall then find sureties, himself in 10*l.* and two others in 5*l.* each, for one year; in case of not finding sureties he shall be further imprisoned for six months; for the second offence he shall be committed for not more than six months, and find sureties, himself in 20*l.* and two others in 10*l.*, or be further imprisoned for one year; for the third offence he shall be deemed guilty of a misdemeanor, and on conviction be transported for seven years, or imprisoned for not more than two years: these provisions as to punishment shall extend to Scotland. s. 1. Owners or occupiers of land, lords of manors, or their servants, may apprehend offenders, and offenders offering violence to any such person shall be deemed guilty of a misdemeanor, and be liable to be transported for seven years, or imprisoned not more than two years: these provisions as to punishment shall extend to Scotland. s. 2. A justice on the oath of one credible witness, or, in Scotland, on the application of the procurator-fiscal of the court, may issue a warrant for the apprehension of offenders. s. 3. The prosecution for every offence punishable on conviction shall be commenced within six months; or punishable upon indictment within twelve months after the commission of the offence. s. 4. S. 5. gives a general form of conviction. Any person aggrieved by any such summary conviction, may appeal to the next general or quarter sessions; in case the conviction shall be confirmed, the court shall order the offender to be punished according to the conviction, and to pay costs. s. 6. No such conviction, &c. shall be removed by certiorari. s. 7. Every such conviction for the first and second offence shall be returned to the next quarter sessions, and registered, and shall be evidence in a prosecution for a second or third offence. s. 8. If persons to the number of three, being armed, shall, enter any land by night for the purpose of taking or destroying game, or rabbits, they shall be deemed guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, shall be liable to be

transported for seven years, or imprisoned not more than three years. s. 9. S. 10. and 11 relate to Scotland. For the purposes of this act, night shall be considered to commence at the expiration of the first hour after sunset, and to conclude one hour before sunrise. s. 12. The word "game" shall include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. s. 13.

**CAP. 70.**—An Act to alter and enlarge the Powers of an Act passed in the Seventh Year of the Reign of his present Majesty for extending to Charing Cross, the Strand, and Places adjacent, the Powers of an Act for making a more convenient Communication from Mary-le-Bone Park, and for enabling the Commissioners of his Majesty's Woods, Forests, and Land Revenues, to grant Leases of the Scite of Carlton Palace, and for other Purposes relating thereto.

[19th July, 1828.]

**CAP. 71.**—An Act to Empower the Deputy Warden of the Cinque Ports and Lieutenant of Dover Castle to act for the Lord Warden of the Cinque Ports and Constable of Dover Castle during the Indisposition of the present Lord Warden.

[19th July, 1828.]

**CAP. 72.**—An Act to extend the Provisions of the East India Mutiny Act to the Bombay Marine.

[19th July, 1828.]

**CAP. 73.**—An Act to provide for the Relief of Insolvent Debtors in the East Indies, until the First day of March, one thousand eight hundred and thirty-three.

[19th July, 1828.]

**CAP. 74.**—An Act for improving the Administration of Criminal Justice in the East Indies.

[25th July, 1828.]

**CAP. 75.**—An Act for the further Improvement of the Road from London to Holyhead, and of the Road from London to Liverpool.

[25th July, 1828.]

**CAP. 76.**—An Act to amend the Laws relating to the Customs.

[25th July, 1828.]

**CAP. 77.**—An Act to amend the Acts for Regulating Turnpike Roads.

[25th July, 1828.]

**CAP. 78.**—An Act for extending the Acts passed in the Forty-third and Forty-ninth Years of the Reign of his late Majesty King George the Third, for the Sale and Mortgage of Estates of Persons found Lunatics by Inquisition taken in England and Ireland, so as to authorise such Sale and Mortgage for same Purposes; and for rendering Inquisitions on Commissions of Lunacy taken in England available in Ireland, and like Inquisitions taken in Ireland available in England.

[25th July, 1828.]

**CAP. 79.**—An Act to repeal an Act passed in the Third Year of his present Majesty for apportioning the Burthen occasioned by the Military and Naval Pensions, and Civil Superannuations, by vesting an equal Annuity in Trustees for the Payment thereof.

[25th July, 1828.]

**CAP. 80.**—An Act to enable Bankers in Ireland to issue certain unstamped Promissory Notes upon Payment of a Composition in lieu of the Stamp Duties thereon.

[25th July, 1828.]

**CAP. 81.**—An Act for making Promissory Notes payable, issued by Banks, Banking Companies, or Bankers in Ireland, at the Places where they are issued.

[25th July, 1828.]

**CAP. 82.**—An Act for making Provisions for the lighting cleansing, and watching of Cities, Towns Corporate, and Market Towns in Ireland, in certain cases.

[25th July, 1828.]

**CAP. 83.**—An Act to provide for the Administration of Justice in New South Wales and Van Dieman's Land, and for the more effectual Government thereof, and for other purposes relating thereto.

[25th July, 1828.]

**CAP. 84.**—An Act to continue an Act for amending and consolidating the Laws relating to the Abolition of the Slave Trade.

[25th July, 1828.]

**CAP. 85.**—An Act for remedying a Defect in the Titles of Lands purchased for Charitable purposes.

[25th July, 1828.]

[This Act is given verbatim, at p. 308, ante.]

**CAP. 86.**—An Act to amend an Act for the Amendment of the Laws respecting Pilots and Pilotage, and also for the better Preservation of floating Lights, Buoys, and Beacons.

[25th July, 1828.]

**CAP. 87.**—An Act to continue until the Twenty-fifth day of March one thousand eight hundred and twenty-nine, and from thence to the End of the next Session of Parliament, an Act passed in the Sixth Year of the Reign of his present Majesty respecting deserted Children in Ireland.

[25th July, 1828.]

**CAP. 88.**—An Act to repeal certain Provisions in several Acts relating to the Butter Trade in Ireland.

[25th July, 1828.]

**CAP. 89.**—An Act for raising the Sum of Sixteen Millions and Forty-six thousand Eight hundred Pounds, by Exchequer Bills, for the Service of the Year One thousand eight hundred and twenty-eight.

[25th July, 1828.]

**CAP. 90.**—An Act to amend the Acts for regulating the Reduction of the National Debt.

[25th July, 1828.]

**CAP. 91.**—An Act to authorize the Advance of a certain Sum out of the Consolidated Fund for the Completion of the Welland Canal Navigation in Upper Canada.

[25th July, 1828.]

**CAP. 92.**—An Act to consolidate and Amend the Laws relating to Savings Banks.

[25th July, 1828.]

*Note.*—We have given a very full abstract of the above act in a former part of this number ; see ante, p. 414.



**CAP. 93.**—An Act to allow Sugar to be delivered out of Warehouse to be refined. [28th July, 1828.]

**CAP. 94.**—An Act for rendering valid Bonds, Covenants, and other Assurances for the Resignation of Ecclesiastical Preferments, in certain specified Cases. [28th July, 1828.]

**CAP. 95.**—An Act to apply the Sums of Money therein mentioned for the service of the Year One Thousand eight hundred and twenty-eight, and to appropriate the Supplies granted in this Session. [28th July, 1818.]

## EVENTS OF THE QUARTER, &amp;c.

It is almost unnecessary to state that this concluding summary does not depend upon ourselves. We cannot make events; and we regret to say that the *an dits* of the legal world have very frequently no better title to authenticity than the idle gossip of a maiden lady's tea-table. Besides, if we insert anecdotes, we are accused of bad taste; and on account of a passing joke on the florid style in oratory, we have been assailed on all sides by a set of twaddlers, who go about condemning us for a vice (personality) of which no work of the day is so innocent as this; and threaten, God knows what, against editors, writers and publishers, as if such clamouring could possibly depreciate us, or prove any thing but their folly and their fears. It has been actually reported that, as a punishment for one luckless allusion, the Magazine was unanimously voted out of the Benchers' room at each Inn of Court; a story, with regard to which, we shall content ourselves with begging that any gentleman to whom it may be told will be kind enough to enquire of the narrator, how the deuce the Magazine got there? [This story almost equals the one about the three crows. When the first Number was published, a Benchers of the Middle Temple kindly offered to produce it at the Bench table; but happening to glance over the Events of the Quarter, he was induced to surrender his intention for fear of offending Mr. M., of whose style of oratory a somewhat ludicrous illustration had there been given. This simple incident forms the sole foundation of the report alluded to above. In fact, no periodicals, at all, are taken in by the Benchers, as a body. *Note to Second Edition.*] But to be serious,—we are aware that friends whom we highly respect wish us not to criticise cotemporaries; and for *their* satisfaction, we beg leave to say, that we never intended, and do not intend, to be personal; and in following up this resolution we exercise no slight portion of forbearance, as we have now before us an ample supply of circuit gossip, and nisi prius incidents, the details of which would be amusing and instructive to all except to those who might figure in the tale. Not that we see any harm in stating that Mr. Justice \*\*\*'s health was drunk with three times three by a club of "irregular appropriators," at the last S\* \*\*\*'s assizes, on account of his kind, considerate, and conciliatory treatment of some few of the members; or in mentioning that Mr. Justice \*\*\*\*\* was particularly attentive, during the whole of his circuit, to the arrangement of the gallery, and the comfort of the country girls and bumkins who came to stare at him; and that on one occasion he actually broke off a summing-up with "Mr. Under-sheriff, I should be glad to know what that fat man means by pressing against those two young women in the third row of the gallery;" and, on another occasion, singularly diversified his reply to an honorable foreman of a grand jury, by a somewhat similar parenthesis—"Really, Mr.

Foreman, I am so exhausted, so worn out with the conduct,\* the outrageous conduct of the witness in the box, that — there now is another man standing up in the gallery with his hat on, and"—added his Lordship, with a deep sigh—"and a *tell* man too." Again we can see nothing very atrocious in relating that Mr. Baron \*\*\* \*\*\* impressively informed a culprit, who was reduced to the necessity of crossing the herring-pond, and in a condition to say, with the very prince of depredators Barrington —

"True patriots we, for be it understood,

We leave our country for our country's good :"—

that, we repeat, Mr. Baron \*\*\* \*\*\* once passed sentence of transportation on a prisoner of this sort, by telling him in a tone of thunder, "Your indignant country shakes you from her shores;" and excited the imagination of another offender, who had incurred a still severer penalty, by telling him — "That sun now rising in meridian splendour, will shortly light you to an ignominious dissolution." Neither can we admit the sin of recording that an information against one of the great Unpaid, whose general wisdom and purity we will contend for to the death, is, or lately was, in the hands of an officer of the crown, in which it was set out, "for that the said justice had committed the said appellant in the terms following, to wit, for that the said C. D. had then and there *feloniously* jumped over the fence of A. B. and then and there *feloniously* declared that he would do so again as often as he chose." Neither, again, should we think it an infringement of the palladium of the constitution, or a stain upon the motto of the immortal Erskine, "Trial by Jury," were we to allege that, once upon a time, twelve good and lawful men of the county of — found the prosecutor instead of the prosecuted guilty, and, on being reminded of their mistake and sent back to reconsider their verdict, laid their hands upon their hearts, and solemnly declared, that "they could not find it in their consciences to say otherwise;" or were we to illustrate the sagacity of Norfolk, by transferring to our pages a newspaper report, that a jury of a county, which numbers Coke among its worthies, after retiring to consider their verdict in a libel cause (the libel being an assertion on the part of the defendant, that the plaintiff had stolen a goose), came back to enquire of his Lordship the price-current of geese in general and the price of that goose in particular; and, on being informed that the prime cost of the goose in question, bating the feathers, was 5s., immediately gave damages to that amount. Neither does it strike us to be an imputation on the astuteness of pickpockets, to relate that at the last G \*\*\* \*\*\* sessions, a character of that description simply required of the chairman, on being asked for his defence, that justice might be done him—"Justice, justice," said the chairman, with a look of wonder, "What can he mean?" "Why," rejoined the fellow, "I trust your honour will give me fourteen years' transportation."† Nor, lastly,

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\* The witness amongst other profanities kept on saying, that what he deposed to was "as sure as God made apples."

† These sessions produced another "event." A woman was arraigned for stealing something: when called on for her defence, one of the council whispered her that

is it any slur upon special pleaders, to make public the reply of an enlightened judge to a friend, who had requested his advice as to the expediency of attaching his son to that branch of practice. — “ In one word, my dear Sir, can your son eat sawdust without butter ? ”

But such topics and allusions would be stigmatized as trashy, frothy, superficial and vulgar, — a wretched affectation of humour, — a miserable mockery of wit, — the refuse of jest books, — the leavings of the press ; and (to borrow the, pet phrase of the mannerist’s vocabulary) plainly, decidedly, and emphatically *low*. A journal of jurisprudence should be sustained and grave throughout ; legal study does not admit of wanderings ; your rising lawyer knows nothing of the ludicrous, nor ever admits an extraneous association.

He has a gravity would make you split,  
And shakes his head at W\*\* \*ms† for a wit.—

He is a sort of Peter Bell in his way.

A primrose on the fountain’s brim  
A yellow primrose is to him,  
But nothing, nothing more.

Or, more correctly speaking, he

Finds law in trees, law in the running brooks,  
Law in the stones, and law in every thing.

It has been announced, too, from the high places of the forum, that the court of King’s Bench does not recognize the classics.‡ Can we then expect it to tolerate anecdote ? Is it not clear, that if we venture a step from the straightforward path marked out by authority, we shall soon be “ out of court,” as already we are off the Bench table ? For the future, therefore, we shall strive to be as solid and gentlemanly as possible—to keep clear of envy, malice and uncharitableness, and think rather of the weight of our metal than the sharpness or quickness of our shots. We will endeavour to assist in turn all kinds of practitioners ; throw in nothing to distract attention ; and act, in short, with such consummate submission to the spirit of the times, that the most inveterate formalist may read us and retain his self-complacency, “ any thing herein contained to the contrary thereof in any wise notwithstanding.” So much for professions and apologies ;—and now for facts :

The lists given above will shew the state of business at the last assizes. There was, generally speaking, a great decrease on the *nisi prius* side, and (although in some counties the proportion of heinous offences was greater than formerly, and cases of assault on female infants appear to multiply) there was also a diminution of crime ; justly, we believe, attributed by C. J. Best to Mr. Peel’s improvements.

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the prosecutor’s property in the thing alleged to be stolen had not been proved ; and she made the objection. “ Why no, I don’t think it is,” said the presiding magistrate ; “ but you’d better be convicted, and have a slight or nominal punishment.”

† C. F. *sed quare*.

‡ Per B\*\* \* J. overruling Lord Mansfield ; Mr. J. W\*\* \* \* \*, K. C. *pro- testans totis viribus*.

The Law Commissioners continue, of course, to excite considerable interest, and are certainly exerting themselves with a degree of energy which does them the highest credit. For once, most certainly, the public will not be trifled with: the promise of amendment will not be kept to the ear and broken to the hope; every effort is making to simplify; and if law proceedings are not corrected now, we shall not hesitate to say, that the failure is attributable to the natural resistance of things, much rather than to sinister intentions. We would check, however, too ardent expectations. The little yet decided on has proved unanswerably the difficulties of the task. Fines and recoveries, which Mr. Saunders valued as his own bowels, are already destined to the knife.\* A paper against them has been given in by Mr. Tyrrel, and is very highly spoken of; but even he, it seems, has not been able to provide for the contingences unexpectedly arising, when any part of an old system is removed. It is very easy to cut off a limb, but not so easy to apply the ligatures.

Mr. Humphreys has been subjected to one day's examination, and is to be examined again to-morrow (the 22nd). We understand that the Conveyancers' Club has been applied to for a report, but that they have come to a resolution that no suggestions shall be made under their collective sanction which are not carried *nem. con.* This seems to exclude all hope of effective aid from the body, though their assistance as individuals will be of course invaluable.

The Common Law Commissioners have resolved on remodelling the action of ejectment; but are involved in precisely the same sort of embarrassments by which the abolition of fines and recoveries is retarded. The discussion of other changes in pleading is stopped for the present; a communication from the Government having been received a few days ago, by which the commissioners are required to make the judicial organization of Wales, and the practice of the courts of Westminster, the chief topics of enquiry for the present; reports upon these heads being wanted by the commencement of the next Session of Parliament. Numerous schemes have been submitted for inspection; and C. J. Best and Sir J. Scarlett are valuable contributors; but there is a strange sort of rumour abroad, as to the Chief Justice's statement having shared the fate of Dr. Granville's documents and being returned *non est inventus*. Old stagers anticipate a good deal of sport from baiting Mr. Brougham, when his turn to be examined comes. They are chuckling at the notion of hampering him with technicalities, and bringing his sweeping asseverations to the trying test of detail. We are by no means sure that we should give them the opportunity were we in the orator's predicament. It would perhaps be better to say at once, "I have solved the problem, it is your duty to work out the corollaries;" than to go and be bored with questions he will certainly be unable to answer, and so give his opponents an opportunity of sneering at and discountenancing the cause he has hitherto so honourably promoted. And yet if they are right in their anticipations, what does it prove? Though he should be obliged to hold his tongue or recant a little, the country will thank him for the commissioners, and the commissioners will thank him for their fees. A general may map out a campaign, with-

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\* It is worthy of remark that Blackstone, the presumed advocate of antiquated error, called long ago for this particular alteration.

out having inspected each hamlet on the plan ; and a statesman may furnish a good outline of a scheme, though quite unable to anticipate each minute particular. Surely no one (except Lord N—g—t, whom on the night of delivery we saw applauding it with might and main,) ever took Mr. Brougham's peroration for gospel. Every body knows that eloquence, like poetry, must be founded upon fiction : exaggeration is of its essence : it lives and moves and has its being upon stilts. Mr. Brougham was not deceived himself, though he certainly deceived the resurrectionist of Hampden ; he knows that the charges of litigation are susceptible of very trifling deductions : even in his highest flights he appeared to us (eye-and-ear witnesses of his action and words) to be merely paraphrasing a hackneyed joke ; and, when he talked of law being " the inheritance of the poor," to be meaning nothing more than that law suits and poverty most commonly descend together. But we must give over this disjointed chat, to record the names and deeds of the departed.

It is our duty to mention the death of Mr. Serjeant Heywood, Chief Justice of the Caermarthen circuit, as also that of Mr. Walter Burton, author of the " *Elementary Compendium of Real Property*," noticed at the commencement of our 4th article ; and we gladly take this opportunity of saying that the notice was written and printed before we heard of Mr. Burton's death. It is a common place to say that he is a loss to the profession ; but it is the simple truth. There is nothing in his private history which is likely to interest the reader. His life up to the publication of his book, which instantly diffused his fame, was " one of those humble streams which have scarcely a name in the map of life, and the traveller might have passed it by, without inquiring its source or derivation." It may however be pleasing to the law-student and man of letters to be told that his favourite relaxation, like that of Fearn, was the pursuit of science. At Eton he was the pupil of the present Bishop of Chester (Sumner) ; at Oxford he took a double-first class ; and at the time of his death held a fellowship on the Vinerian foundation.

Mr. Serjeant Heywood died on the 11th of February last, aged 78. The most memorable circumstance of his life was his acquaintance with Mr. Fox. To this he owed his promotion ; and, in some measure, his reputation as a writer. Before taking the coif he enjoyed a considerable practice on the northern circuit and in town ; but he certainly injured himself by his first accession of dignity, and was never much employed as a leader. Shortly after the death of Mr. Fox, Mr. Serjeant Heywood procured his seat upon the bench of the principality, chiefly through the interest of Lord Grenville. In what manner he discharged its duties is best learnt from those among whom he acted :

" We lament to state, that the paralytic attack of C. J. Heywood has terminated fatally, the venerable judge having paid the debt of nature at Tenby yesterday at noon. We believe that one sentiment of regret will pervade all the profession when they hear of his death, for he was much beloved and respected by all who knew him. It is true, he was not able latterly to discharge the arduous duties of his profession with that precision and expedition which the interests of justice required ; but nature was sinking ; the judge was superannuated ; and there was no retiring pension to enable the worthy dispenser of the laws to retire from a situation which he had long occupied with unblemished integrity. Surely those who have served their country

faithfully in a *civil* capacity should not be left without the means of retiring when they become superannuated in its service."

So says the Cambrian and Caermarthen Chronicle; and the paragraph is as pretty a specimen of Welch composition as we ever remember to have seen. It was the sagacious Editor of this paper, by the bye, who, after the junction of the Whigs, was pleased to assure the country that its interests were in safe keeping, by announcing from a small town in the principality, "*We*, (the editor of the Caermarthen Chronicle,) shall keep *our eye* on Mr. Canning." The views therefore of this one-eyed observer must, perhaps, be taken *cum grano salis*; and we will answer for nothing but the beginning of the paragraph. In 1811, Mr. Serjeant Heywood published a defence of Mr. Fox's Historical Fragment, against Mr. Rose's attack upon the authenticity of the authorities cited and the tendency of the opinions professed in it. The defence is certainly a clever production, and manifests a good deal of controversial tact. The Preface, in particular, contains many keen sarcasms; one of the best is the recapitulation (p. 25 to 27.) of the claims put forth by Mr. Rose to historical discrimination.

"In some respects, he (Mr. Rose,) seems to think himself peculiarly qualified to write a history, or to make observations upon the histories of others. He had been introduced to Lord Marchmont, and had seen Hume the historian frequently; he was accustomed to official accuracy; had read much and thought more upon the history of his country, and agreed with Mr. Fox, that there are certain periods at which the mind naturally pauses to meditate," &c. &c.

Mr. Serjeant H. is also the author of "A Dissertation upon the Distinctions in Society and Ranks of the People under the Anglo-Saxon Government," and of two publications upon Election Law.

The Welsh Assizes were delayed about three weeks in consequence of Mr. Serjeant H.'s death; and, apparently, the negligence of the government. The late puny judge of the Caermarthen circuit, (Mr. Balguy,) had given in his resignation time enough, before the assizes, to appoint a successor; but unluckily no one was named, and thus great confusion and inconvenience were produced. The assizes were held at last by Messrs. Clarke and Goulburn, and it is singular that, in the interval of delay, the cause-list at Caermarthen had swelled from 14 to 21. We do not hear of any new appointments having been confirmed as yet. Indeed, it is confidently stated that, by the next assizes, Wales will be included in the English Circuits.

And now for CORRESPONDENTS. A. B. and C., X. Y. and Z., with many others, are safe at the bottom of the Balaam-box. *Facilis descensus Averni; sed revocare gradum*,—every body knows the rest: the meaning is, that when a paper gets into such a place, it does not very easily get out. Mr. E. of Rugby, will see that his amendment is adopted; and we have also taken the hint of the Editor of the Monthly Review. For reasons stated above, we cannot insert "Contemporary Portraits," though we feel much obliged to our correspondent for his spe-

cipien, which is admirably touched off. *Anti-dogmaticus* must have been christened by the rule of contraries, like *lucus, a non lucendo* ; he is the most positive fellow we ever met with. Let him look again, and he will find the words that he accuses us of putting into Fearne's mouth, are taken verbatim from the Essay ; but they form the author's second example ; and our friend perhaps, contented himself with trying to master the first. On discovering this blunder of his own, he will perhaps be more charitable to us, and not alloy the commendation (which we thank him for) with such very strong reflections on the incorrectness of a single proposition. Every thing human has a perishable part, and our Magazine partakes of humanity. The best writers in the best reviews stumble occasionally ; but courteous readers allow for this ; and we never heard that the Quarterly has been read the less because a celebrated article on the mining-mania, rather injudiciously transferred a state or two of South, to North America. There are moments in the life of every man, and most especially in that of an Editor, disappointed by contributors, hurried by subscribers, teased by his publisher, and tormented by devils ; when he feels, to the bottom of his soul, the truth and pathos of the Lexicographer's apology, " That what is obvious is not always known, and what is known is not always present ; that sudden fits of inadvertency will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning ; and that the writer shall often in vain trace his memory at the moment of need, for that which yesterday he knew with intuitive readiness, and which will come uncalled into his thoughts to-morrow. *In this work, when it shall be found that much is omitted, let it not be forgotten that much likewise is performed.*" \*

Surely those ignorant critics (and only the ignorant do this) who fly from the instructive and sparkling parts of a work to dwell on flaws and grovel in obscurities, approximate very nearly to vermin ; who, when light is brought to illuminate their haunts, dart off, and hide themselves in holes.

With respect to J. T.'s Dissertation on Presumptive Evidence,

We plunged for sense, but found no bottom there,  
And groped and floundered on in mere despair.

He ought to go to a writing-school, and read Cobbett's Grammar, instead of measuring weapons with a man like Mr. S. M. Phillippe. " Mentor" has so evidently written to please himself, by indulging his garrulity, that we should think a notice unnecessary, but for one allusion contained in his advice : " I am," says he, " of long standing at the bar, and know something of its modes of thought ; if you wish your Magazine to be generally received by them, you must keep up your dignity, and avoid all connection with solicitors. Do not, on any account, permit them to exercise any influence on the conduct of the work, or be known to contribute to it."

Dignity ! Influence of Solicitors ! What ban the man be thinking of ? What induces him to suppose, that any set of men can influence us to our degradation ? We deny that such is the feeling of the bar ; for out of sixteen barristers connected with this work, not one participates the thought ; and with regard, indeed, to the better part of the insinuation, it is downright conceit and ignorance. Does he know, that



Barry Cornwall (Procter), William Roscoe, Sharon Turner, James Smith, and Joseph Parkes, are or were solicitors. Are we supposed fools enough to reject, by anticipation, the assistance of a body, which has given names like these to literature, and a Hardwicke, a Dunning, a Gifford, to the peerage! We are not afraid of our "dignity," but shall sustain it on a plan of our own; not by pompous announcements and insulting professions; by affecting finery and pandering to pride; but by showing, that we possess strength, as well as dexterity; that we can instruct as well as amuse;—search the deep, as well as skim the surface;—forward useful theory, as well as discountenance corrupt practice;—promote the cause of truth and reason, and hold up to public scorn the man who falls away from either.

*October, 21, 1828.*

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N.B.—The number and length of the Reports and Statutes we were obliged to digest and abstract has swelled this Number much beyond our prescribed limits, and considerably delayed its appearance. Subscribers will have the goodness to set-off their gain in matter against their loss in time.

# THE LAW MAGAZINE.

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ART. I.—PRACTICE OF THE ENGLISH COURTS OF COMMON LAW — FRENCH PROCEDURE, INCLUDING THE HISTORY OF A FRENCH SUIT WITH ITS INCIDENTS — LAW ABUSES OF FRANCE.

(Being a continuation of the first Article in No. II.)

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1. *An Inquiry into the Present State of the Civil Law of England.* By JOHN MILLER, Esq. of Lincoln's Inn. Murray. 1825.
  2. *Rationale of Judicial Evidence especially applied to English Practice.* From the Manuscripts of JEREMY BENTHAM, Esq. Benchet of Lincoln's Inn. Hunt and Clarke. 1827. Book VIII. *On the Technical System of Procedure.*<sup>1</sup>
  3. *Des Institutions Judiciaires de l'Angleterre comparées avec celles de la France, et de quelques autres Etats anciens et modernes.* Par JOSEPH REY, de Grenoble, Avocat, ancien Magistrat. A Paris, chez Nève, Libraire, Palais de Justice. 1826.
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By what is technically termed, *Practice*, is to be understood that body of rules and orders which are intended to regulate the proceedings of the courts, and, particularly, the conduct of the parties, as to the time and manner of taking the various steps which they are required to take in the progress of a suit.<sup>2</sup>

Practice, so defined, forms the subject of the following observations, and a somewhat appalling one it is ; but we trust our

<sup>1</sup> Procedure includes pleading as well as practice.

<sup>2</sup> Chancery Report, 10.

readers will not blame us for selecting it till they have weighed with care the motives of the choice. We might satisfy ourselves with saying, that it lay in our way, and we found it : that, in order to appreciate the system, we must take in turn each one of the parts. This, however, though a fair-enough apology for writing, would be no inducement to read ; and were we not convinced, upon mature deliberation, that this self-same practice comprises much interesting matter and is capable of being popularly treated, we should most assuredly have skipped it.

In the first place, then, one of the most enlightened continental jurists has not hesitated to declare procedure more deserving attention than either the rules of property or the penalties attached to crime.

“ In general, the laws to which the citizen is free to subject himself or not, have a less striking influence. He who is not satisfied with the dispositions of the laws relating to contract or succession may dictate the terms which suit him, or change the order of succession by will. Most civil laws are in a similar predicament : they are obligatory only in cases not foreseen by the parties ; and though these laws are far from unimportant, they are not of such prominent interest in the eyes of the legislator or historian. Next to the civil, the penal laws are least interesting ; for they concern but a small number of individuals ; and, corrupt as mankind may be—often as penal inflictions may occur in some countries, only an insignificant portion of the public are within their range. Besides, no one can be subjected to punishment except by his own fault ; and, therefore, I am fully justified in not attaching to this department of legislation the consequence given to it by certain eminent writers with a zeal which does more credit to their philanthropy than their penetration. But the case is widely different with regard to civil and criminal procedure. In every process there must be one of the parties at least, who, dragged against his wish into a court, and necessitated to litigate his rights, finds himself forced to the adoption of certain arbitrary forms, entirely by the act of his adversary. It is no longer a small portion of the public exposed to the arm of the law : it is no longer by reason of his own act or omission that an individual is brought within its provisions :

but all are daily liable to be summoned themselves, or are under the necessity of summoning some one or other, for refusing to fulfil an obligation. The rich and poor, the honest man and the rogue, the wise man and the fool, may be sued for contracts they never entered into : accused of crimes they never committed ; and disturbed in rights which they cannot surrender. Without lifting a hand or stirring a step, every man is hourly incurring the risk of being hurried into the presence of a magistrate and compelled to establish his right or his innocence according to forms which he has no means of modifying."

"For these reasons," says M. Meyer (whom we have rather paraphrased and abridged than translated), "both civil and criminal procedure are, with reference to general happiness, of much higher interest than civil, commercial, or penal legislation ;"<sup>1</sup> and, without subscribing to the full extent of the parallel, we may thank him for establishing the importance of our subject matter ; which has, moreover, another claim on attention. No division of practical or speculative law is so intimately connected with the higher branches of knowledge ; and that jurisprudence is now associated to these, the most careless observer must own.

The wish of Montesquieu, "*qu'on eclaire l'Histoire par les lois et les lois par l'Histoire*," is almost too common to quote : writers of all sorts have made it their own, and many are struggling to mature it. An historian, now-a-days, would be neglected and despised, were he to confine himself to courts and camps, and princes and ministers : the surer mode of commanding attention would be to trace out and exemplify the relations which have subsisted or do still subsist between the laws and condition of a people. The folly of looking exclusively to the dazzling epochs of history, is now, we fancy, universally agreed on : the age of annalists and chroniclers is gone ; and the majority of living statesmen and economists consider the final establishment of a legal provision for the poor\* (though by the bye not mentioned by Hume) a more important event than the death of Queen Mary : the abolition of feuds as well worth considering as the Popish or Rye-house

<sup>1</sup> Pref. 24—30.

<sup>2</sup> 43 Eliz.

Plot; and the rise of our system of mercantile law as fair a token of national prosperity as the cotemporary rise of our empire in the East. But this is not enough : we design to go further than they ; and we hope our readers will not accuse us of presumption for venturing to avow a belief, that the progress of judicial establishments is just as deserving of discussion ; and that even the practice of the courts, that repulsive depository of pedantry and fraud, is charged with lessons of philosophy. The notion, we own it, is odd : legal forms and philosophy have been kept apart so long that the juxtaposition almost tempts one to laugh ; but stranger things have come to pass, and we do not despair of effecting a compromise. Chemists can make poisonous herbs give out a healing essence ; and moral truth may be got from chicanery if duly submitted to the crucible of thought. It will not, at any rate, be difficult to shew, that the varied expedients of fraud which gradually take place of simplicity, the ingenious modes of evasion which naturally spring up with refinement, and the inventive cunning which comes hand in hand with knowledge and almost seems its curse,—that these form no unimportant division of the history of mind, and are aptly illustrated by technical procedure. This, a few words on its progress and mode of growth will shew.

A suit, in the infancy of civilization, is just the sort of thing which an unsophisticated fancy might figure to itself. Summons,—appearance,—complaint,—defence,—adjudication,—inforcement of the decree ; and it is difficult to make an unpractised person understand why he cannot proceed, at stated intervals, from one point to another, or why he should ever deviate from a straightforward direction, or stop or stumble on the way. Where is the difficulty of giving and obeying a notice to appear : setting out and replying to a charge ; hearing and deciding on evidence : pronouncing and executing a judgment ? “ You see, gentlemen, that all the articles of this Code are referrible to one simple principle. The demandant is to propound his case, the defendant to answer it. But, I may be asked, if the course is so clear, how happens it that the law is so voluminous ?”<sup>1</sup>

<sup>1</sup> Treilhard's *Exposé des Motifs*.

All Christian duties, (we should reply to such an interrogator), so far as they relate to this world, are included in the precept, "Do unto others as you would they should do unto you." How happens it, then, that divines and casuists have been labouring so long to explain these, and that we are still very often at a loss how to act on an emergency, though ever so anxious to act as we ought? One dilemma is just as strong as the other, or rather, just as weak; for though the premises are admissible, the inference is trash; and short and clear as it is, the analysis only leads to confusion. This vulgar notion of a cause is like the idea of a traveller forms of a country beheld from an eminence: his place of destination appears much nearer than it really is, from the many windings of the road and the various inequalities of surface being overlooked, and omitted in the calculation. He cannot travel, as a bird does, through the air: design and accident may both stand in his way; and he may arrive, late at night, fatigued and dispirited, at a resting place, which he hoped to reach, in full vigour, in the morning. The protraction of a suit, like that of a journey, arises almost entirely from interruptions in the regular stages;<sup>1</sup> and these interruptions, we are happy to say, are of a nature that a plain man may understand if he likes.

In a semi-barbarous country, where a popular assembly or an ignorant chieftain sits in judgment, where a nice poising of the scales of justice is impossible and general impressions are capriciously caught up and confidently acted on, interruptions could scarcely occur. It would be vain for a suitor to urge the over-hastiness of his adversary, the want of due notice, the absence of witnesses, the unfairness of compelling him to meet a charge of which no statement whatever, or an intentionally erroneous one, had been given him. The degree in which such matters might affect the merits could not be estimated in the tribunals we speak of: the complaint or protest would be cried down as an attempt at evasion, and judgment would be given at once. It is not till civilization is somewhat advanced, that the benefits of a more regular administration of justice begin to be appreciated, and forms of proceeding are framed to secure it. But the moment they

<sup>1</sup> Eunomus, Dial. 2. Introd. to Tidd's Practice.

are so, adieu to dispatch : every rule creates an obstruction and may harass as well as protect.

Suppose any set of rules established : suppose it laid down as a general one, that the summons shall be delivered to the party, or left at his dwelling house ; or, when he is not to be found and has no settled residence, that it may be posted up in the court or inserted in the Gazette ; and that other proceedings shall be served personally or filed in a particular office, of which filing the party shall be bound to take notice without warning ; and that any one neglecting a summons or proceeding legally served, shall after a certain time be deemed a defaulter and held to have admitted the complaint. Assume that the summons is required to specify some few particulars, such as the names and address of the parties and the nature of the demand, and that other papers must be formal to a certain degree ; — assume this, and you have at once a fruitful source of interruption. A defendant against whom the penalties of default have been enforced, may take his stand on each one of the assumed formalities. He may say that the names are misstated (as is done in our pleas of abatement) ; that a paper was indeed delivered him, but at an illegal hour ;<sup>1</sup> that the house in question was not his residence ; that proper inquiries had not been made before dispensing with the first order of regulations, (i. e. that he had been gazetted or the proceeding merely stuck up without the proper means having been taken to ascertain that service on the person or at his residence was impracticable.) Should any of these courses be pursued and the other party maintain the regularity of his proceeding, no court could refuse a collateral enquiry ; a hearing must be appointed, and, when the facts are doubtful, evidence called. Again, supposing the summons properly drawn and served, the defendant may gain time by disputing the jurisdiction of the judge, requiring a longer time than usual for answering the complaint, or demanding copies of papers in his adversary's possession. It is also clear that the plaintiff at any subsequent stage may stand in need of

<sup>1</sup> Thus in France no process can be served except between six and six in the winter months, and four in the morning and nine in the evening in the summer months. Code de Proc. part 2. liv. 3.

similar indulgences. When the formal altercation is ended, and the points in dispute evolved so as to be ready for trial, delay may be rendered necessary by the illness or absence of a material witness, or by the length of time required for collecting documents or bringing them from abroad. At the trial the litigant may be taken by surprise, or the judge may form a wrong estimate of the evidence; and, when such things happen, the court above is applied to for a re-hearing. Even after judgment there is such ample room for dispute, that the able expositor of the first part of the French Code of Procedure (Treilhard) deemed an explanation of the incidents to execution (i. e. enforcement of the decree), a convincing example of the unavoidable complication of practice; and considering that the decision may be carried into effect by bodily constraint or seizure of lands and moveables, or by two of or all these methods; considering the disputes that may arise about the capture and detention of the prisoner, the taking, collecting and disposing of his property, the competition between creditors and the adjustment of their claims, the state counselor's is no bad illustration. The occurrence, too, of a death, a bankruptcy, or, in certain cases, a marriage, may diversify the progress of a suit, a new set of interests being thus created;<sup>1</sup> and occasional disputes may arise upon the appointment and change of counsel and attorneys.<sup>2</sup>

The list of possible impediments might be greatly enlarged, but these are enough for a sample: enough to dissipate the too common delusion with regard to the smoothness of the course. Any man may supply what is wanting to the sketch by referring to the table of contents in any book of practice; and the jurist who is satisfied with a sweeping view from an eminence, must take our word for the existence of difficulties which he has not descended to try. But we shall not tax his credulity too far: it is our intention to investigate the principal stages of a suit, to specify the best methods of shortening them,

<sup>1</sup> So fertile a source of incidents is this, in Germany, that when a party sues in a representative character, the establishment of that character is a preliminary and distinct proceeding, which has formed the substance of many treatises. Themis, tom. ix. 275.

<sup>2</sup> This topic takes up 100 pages of M. Holveg's work on Procedure. Ibid.



and fix the point beyond which it would be dangerous to innovate. We shall fail in our object, if we are not able to shew that regulations as complicated as we may find it necessary to retain, would result from the wants of society and grow up in the course of things, though all recognized distinctions were done away to-morrow. Nor will this sort of inquiry be useless to the student who, neglectful of theory, despising speculators and wishing only to learn law as a trade, must have the *cui bono* qualities of all subjects explained before he condescends to discuss them. He may rest assured that the asperities of Tidd and Archbold are softened down, instead of being aggravated, by occasional digressions. We really become better acquainted with things as they are by disputing what they ought to be ; and some sort of interest is thus given to points which no mortal mind could grapple with effectually as unconnected, unassociated particulars. A man gets a rule by heart more easily and certainly applies it better, for knowing the reasonings which led to its adoption and the institutions and customs to which it may be traced—for having viewed it as part of a system, as one of the details of a plan. To determine its expediency he must have placed it in all possible lights, searched it round and round, and racked his ingenuity to anticipate all modes of perversion ; and is not he, who has done this, necessarily an abler practitioner, considered even as a case lawyer, than one whose memory is unaided by principles, and who, when an index has supplied him a precedent, can merely state the strict letter of the law ? This may do very well when the current of decisions has been uniform, when the circumstances are essentially the same, and judicial dicta happen to harmonise ; but it will not do, when the terms are vague and the meaning obscure, when the spirit of judgments apparently conflicting is to be extracted and authorities are to be reconciled by ingenious collation, when an artful subterfuge must be met and counteracted, or a relaxation of strict form be called for : then a higher order of intellect comes into play, and the advantages of a more liberal cultivation are seen and acknowledged. These remarks, too, derive additional weight from the changes about to take place. We shall therefore go on referring to considerations of expediency, nay, even to those models of excellence which ardent

innovators amuse themselves with framing. Some people may think this, also, a mere waste of time ; but surely a plan or suggestion may serve to enlarge our views and stimulate research, though too bold and wild and sweeping to adopt; and considering the cramping nature of practical studies, the over-cautiousness one is apt to acquire from dwelling too long upon difficulties, and the dispiriting influence of an atmosphere of doubt, it may sometimes be well to freshen our feelings and invigorate our thoughts with the purer air and brighter skies of a freer and more fancied philosophy.

And upon nearly the same principle, with the view of gaining in comprehension and accuracy, we have examined with care the systems of foreigners and shall briefly state the results. Nobody, we say with M. Rey, can deny the utility of this mode of proceeding. It has all the advantages of comparative anatomy, and affords occasion for a crowd of reflections, arising from contrasts and analogies, which a simple commentary would never suggest.

All civilized states, therefore, it must be improving to contemplate, and most particularly France. Not only do her social relations approximate most nearly to ours, in quality, number and complexity; but she possessed originally the same feudal establishments: maintained a long and anxious struggle against the very corruptions we are endeavouring to remove; and, in the hope of disenthraling herself from prejudice for ever, has undergone the most trying ordeal through which a country can pass. So that, if her law abuses are identical with ours or even if there is a strong family likeness between them, and those of France can be shewn to have baffled the most unrelenting hostility and even grown and multiplied beneath the knife, it will be by no means illogical to infer that there must be something more than meets the eye to cause such a maze of confusion. At least we shall see the expediency of varying the mode of attack; and, on the other hand, if forms in France are advantageously dispensed with, which custom has taught us to venerate (and this will frequently occur), we shall be provided with the best possible arguments against the ultras of an opposite description.

We have just said that a valuable moral is deducible from the history of French Procedure ; yet we must content ourselves with a rough outline of its primitive state and a rapid sketch of its successive mutations. The recondite lore so well employed by M. Meyer may remain a dead letter to us ; indeed, the judicial systems (if they merit the term) of all feudal states were so nearly alike, that our preceding remarks on such systems in general will be found to include the early judicature of France. Procedure, properly so called, can scarce be said to have existed till the establishment of courts filled by men exclusively devoted to law ; not in England for instance, till the Common Pleas was fixed ; nor, in France, till the institution of parliaments. Then, for the first time, more artificial modes of inquiry were pursued : pleaders of causes began to congregate ; and jurisprudence became a profession for which a due proportion of learning was required. But learning at that time was miserably corrupt and for the most part confined to the clergy ; who poured into the new tribunals by shoals ; monopolised the conduct of causes and not unfrequently the judgment seat ; excluded the vernacular tongue for a miserable jargon invented by themselves ; refined and cavilled, distinguished and complicated, till the rudeness of the former period was completely overlaid with metaphysical subtleties, and sense and reason lay buried in the mass. The clergy, we say, enjoy the credit of this, and rather too exclusively.<sup>1</sup> They may have had the civil and common law to themselves and made a bad use of their privileges ; but scholastic reasoning was the vice of the times and pervaded each class of society. Love, law and physic were equally refined upon ; men pleaded for hearts as they pleaded for damages ; and administered medicine and justice alike ; with an exact attention to petty observances and the preliminary rehearsal of some canonised absurdity. Churchmen have had enough to answer for in their own line ; and it is going rather too far to charge them with peculiar and interested designs upon law, at a time, when long treatises were written to decide how many angels could dance on the point of a

<sup>1</sup> Both Rey and Meyer attack the clergy for it.

needle without jostling: which was the greatest in the eye of God, a possible man or an actually existing fly, — with other points of similar importance: when ladies sat day after day, in solemn conclave, to solve such momentous questions as, — whether a lady, who had pledged herself to favour an admirer when a prior love-affair should chance to determine, was bound to act upon her pledge immediately on her marriage with the gentleman entitled to precedence; it being argued that love must necessarily cease on possession.<sup>1</sup>

Be this, however, as it may; whether the times corrupted the clergy or the clergy the times, a rich legacy of fraud was bequeathed to posterity, which posterity has tried in vain to renounce. At this very hour the larger part of Europe is suffering from the bad logic and bad taste of the middle ages, and only shaking off the effects by degrees. Even France, as we shall presently see, still feels their influence, after sacrificing the peace of a generation to clear away the corruptions of antiquity. Nor is the final effort all: law-abuses in France have been formally combated again and again; and reforming ordinances are the most instructive and only interesting means of tracing the changes we are anxious to mark.

The first land-mark of this sort is an ordinance in 1363, from which it appears that delay and prolixity had even in that rude age attained to a formidable height and that much inconvenience had resulted from the formal division of actions, which accordingly was thereby prohibited. That this ordinance failed as to its principal objects is evident from the two next, (of 1367 and 1391.) With regard, however, to the formal division of actions, the law of 1363 was completely effective,

<sup>1</sup> And so held by the Court after taking the opinions of the most experienced female practitioners. The case is fully reported in the second volume of "*Extraits des Troubadours, par M. Reynouard*," who gives a full account of the *Cours d'Amour*. It is singular that the *Code d'Amour* has been overlooked by the writers against Codification, for whom it is strictly in point. It consisted, at first, of 31 articles, in so concise a form that it was traditionally said to have been discovered round the neck of a dove by a knight errant in search of adventures, and by him conveyed to his lady-love. The discovery of the institutes at Amalfi scarce produced a greater sensation; nor were the Institutes themselves more overlaid with commentary. Under the influence of female ingenuity, the compendious code soon became a voluminous system and went out of fashion on account of its unwieldiness; or, it may be, because the ladies found other modes of amusing themselves. Specimens of the school-logic may be seen in *Martinus Scriblerus*.

as we hear no more of this in subsequent enactments.<sup>1</sup> The next we meet with are those of 1454 and 1457, the first of which, though not mentioned by M. Rey, is remarkable for the reason assigned in the preamble; "for otherwise, by reason of the length of the pleadings, causes will become immortal." By the other, the redaction of all the customs of the kingdom was ordered and a body of general rules prescribed. This, too, comprised many provisions against the length and complication of proceedings. About a century after (1563), Charles the 9th passed a somewhat similar law, the preamble of which recites the total failure of all former attempts. Accordingly recourse was had to a most singular expedient, which has been hinted at occasionally by more modern reformers: no one was allowed to bring an action without first depositing a certain sum, to be forfeited if the action failed. How long or with what degree of vigour this regulation was enforced we are unable to declare: we only know that the evils of litigation were unabated at the expiration of another century, when the ministers<sup>2</sup> of Louis the 14th applied themselves in earnest to the work. The Ordinance of 1667, which, with the commentary of Jousse, formed the French code of procedure till the revolution, is said to be remarkable for conciseness and perspicuity and to manifest throughout the best intentions in the framers. Voluminous as it is, there is scarce a title which does not abolish some means of procrastination or instrument of chicanery; and a perusal, says M. Rey, leads to the conclusion that the abuses of practice had been augmented to a degree literally inconceivable. "Unhappily they could not correct every thing; but to the honour of these legislators, it must be owned, that whilst preserving the foundations of a corrupt system, they could not do more in the way of partial amelioration."<sup>3</sup> Yet these wholesome provisions were as nugatory as the rest, and subsequent abuses became so intolerable that in 1763 even the advocates and procureurs petitioned against them. Begging our readers to remember that these attempts at reform will

<sup>1</sup> The division alluded to is such as into trespass, assumpsit, covenant, &c. It is now unknown except in the common law courts of England.

<sup>2</sup> Lamoignon was the principal agent.

<sup>3</sup> Vol. i. 250.

probably be useful in the argument, we come at last to the Revolution.

Hitherto we have been noting the fruitless efforts of regular governments, the timid remodellings of men who might be suspected of an attachment to things established, inimical to a liberal reform. Thus we find M. Rey constantly throwing in a few grains of suspicion, and attributing the failure of the various schemes enumerated above to the limited notions of the projectors. According to him, abuses cannot be destroyed without a revolution, not merely in institutions and forms, but in the ideas of those who conduct the change. Here then we have what he wants. Professions abolished : tribunals destroyed : forms trampled on : prescriptive rights despised : a thorough sifting of long cherished opinions : a fair field of trial for the wildest schemes : a public unfettered by prejudice ; and a legislature scouting the very mention of the past. The project brought forward by Cambaceres in 1793, was rejected "*as containing laws which had formerly existed*";<sup>1</sup> a sufficient proof of that regeneration of mind which is deemed essential to national improvement. And in mentioning this, we are not confounding periods so essentially distinguishable as those of the National Assembly and the Republic, and those of Napoleon. We know and feel the difference ; but we have taken up the procedure of France with the hope of illustrating every kind of amendment which the wit of man can contrive. Every description of innovator has had a turn at it, and tried and tried in vain. The limited suggestions of the interested practitioner, the matured schemes of the moderate and well-meaning statesman, the wild invectives and unmitigated condemnation of the leveller, have all been heard, have all been acted on ; and we wish our readers to have the benefit of each. That certainly is the best way of satisfying all parties ; and if the root-and-branch men of the present day object to being confounded with the French agitators, we admit the appeal so far as motive is concerned, but not as it bears on the argument. It must be borne in mind that great radical changes invariably create or are preceded by confusion ; and we cannot give up the induction from consequences.

<sup>1</sup> Reddie's Letter, p. 24.

Yet we are not driven to this style of retort : for instance, we may confidently mention the suppression of advocates and attornies (procureurs) in 1793, as an experiment fairly tried and notoriously unsuccessful, and challenge any man to show cause for supposing that the result would probably be different under a more settled condition of affairs.

“ How can men continue to deceive themselves after the late experiment ? Did we not suppress all pleaders and process in a mania for perfection ? What was the result ? Professional assistance was not the less in request, since the idle and stupid will always be dependant on the industrious and clever : the name of advocate and procureur was dropped, but they continued their business as agents ; the only consequence was, that all regular proceedings being suppressed and the practitioner no longer entitled to a fixed remuneration, he contrived to pay himself, even before investigating the matter, much more than formerly, and justice was never so dear.”<sup>1</sup>

Such was the result of one act of enlightenment, and the cotemporary one was equally unfortunate. The ancient form of pleading being proscribed, the complainant was to give in a simple memorial, to be answered verbally or by a memorial equally simple. By merely enjoining simplicity, the French legislature seemed to suppose they had diffused a taste for it, and effectually excluded prolixity. These astute propounders of principle forgot that no guilt nor folly would remain upon earth, were laws in their spirit obeyed ; and that, in prohibiting superfluity of statement, they merely embodied in words what the corruptest system must always imply. The regulation of course did no good ; the memorials were generally crammed full of long roundabout details, which, for want of rules to refer to, it was more difficult to check than before.\*

These instances may suffice for the zealots of change. The example of the Code is commended to the attention of a more enlightened but still too eager set : to those who think that if the commissioners, now at work on their Report, were en-

<sup>1</sup> Trielhard, *Exposé des Motifs*.

\* “ Now what was to hinder the pleaders or their agents from carrying into the *memoires* all the vices of the old *requêtes* ?” *Rey*, vol. i. 283. In Spain, pleadings are, by law, restricted to one statement on each side : in practice, they are both many and prolix. *Rey*, vol. ii. 311.

dowed with full powers and comprehensive understandings, they might banish pettifogging and procrastination from the courts. Let such reflect on the announcements and high hopes of Napoleon's delegates, and perhaps they may moderate their own.

The Code de Procedure Civil was submitted to six of the best jurists of France, who had each a part to explain and justify to the Assembly.

"His Majesty," says one of these, (Treilhard), "has given us in trust to lay before you to-day, the two first books of the first part of the Code of Procedure. Let not the name recall to you the melancholy image of those antiquated forms which too often stifled justice and ruined the suitor. From the depth of your deliberations has arisen a code which has attained already the approval of nations, an undoubted presage of the respect of posterity. Thanks to the law we offer you, you will have throughout and in all circumstances unvarying rules and uniform procedure. No man, little as he may know of the matter, can fail of being convinced that every source of abuse is removed."

"In short," says another (Galli), "it is the duty of a good legislator to anticipate evil. This has been done. Yes, gentlemen, I guarantee you a body of provisions, clear, simple, devoid of verbiage. Unjustifiable imputations have been thrown out against us, but a short time, a little experience, will shame them."

The rest employ the same tone, and concur in considering their labours beyond the reach of perversion. Nor did they stand alone in this infatuation. The mass of their brethren were equally deceived, and began to think their profession a sinecure or sure at least to be shorn of its beams. "You may throw away your books," said a celebrated living poet to a Temple student in 1793, "Godwin's Political Justice has superseded them all."<sup>1</sup> "We may throw away ours," said the lawyers in France, in 1807: "we shall no longer rank as a learned profession, unless 'de passer pour savans,' we take up the Roman law." Twenty years of experience, adds the writer who describes this state of delusion, and twenty volumes of decisions,

<sup>1</sup> Hazlitt's *Spirits of the Age*—Godwin.



have proved the fallacy of these expectations;<sup>5</sup> and, as far as the Code of Procedure is concerned, we believe the fallacy was proved in a twentieth part of the time. De la Porte's treatise<sup>2</sup> was quite enough for the purpose, but of that anon. Let us first do justice to the framers, and give the outline of their work.

With the exception of their unaccountable confidence and a little occasional flummery addressed to the Emperor, their reports (*Exposés des Motifs*) reflect the highest credit on the delegates. Sound sense, varied experience, liberal views, an earnest spirit of conciliation and a perfect acquaintance with the causes, as well adventitious as inherent, of the confusion they were called on to remedy, are discoverable in every page; and yet these able and enlightened men had the folly and assurance to announce to their countrymen that henceforth they had nothing to fear. A wise prophet will never foretell the happening of any thing in his own time, nor expose himself to the detection of contemporaries. The jurists in question had neither qualms nor apprehensions; they put their names to a statement which a month might refute; they blew up a bubble which must burst at a touch; they set probability at defiance and trifled with truth, though inquiry was sure and the crisis at hand. So glaring a want of foresight is only explicable on the supposition that they put their trust in the tried tact of the Emperor in making professions pass current for deeds and bulletins stand good for successes. Their bombast is certainly in broad contrast with all the rest of the reports, which we have said already, are marked by merits of the highest order. They state, too, their mode of selecting, and the sources from which they drew their materials; among which, ordinances, royal edicts, local statutes, customs and text books, are enumerated. All, we are assured, have been consulted: "experience has been regarded *non en maître qui commende mais en guide qui eclaire*: and if important changes have been made in some parts, they have been led to by acknowledged defects or required by the obvious necessity of making the new practice correspond with the provisions of the Code Civil."<sup>3</sup>

<sup>1</sup> Themis, tom. 8. p. 25. Parke's Contre Projet, Pref. 12.

<sup>2</sup> Commentaire sur le Code de Proc. Civ. Paris, 1807.

<sup>3</sup> Exposé, par M. Berlier.

Such being the spirit and plan of the operators, no work could be executed under happier auspices ; and despite the protests of those (M. Rey for one) who are pleased to talk of it as a narrow-minded production and refuse to abide by the results of the experiment, we shall make bold to mention a few prominent details, not merely as models to imitate, but what is more, as examples to refute with. And a short sketch of a French suit can hardly fail to interest on the eve of a legislative investigation of procedure.

The indispensable preliminary, then, except in some few cases, is the appearance of the parties in the *bureau de conciliation*.<sup>1</sup> In other words, the defendant, unless he appears of his own accord, is formally summoned before a *juge de pair*, whose duty it is to endeavour to effect a compromise. The time allowed for appearance must be three days at least from the service of the summons : the parties must appear in person, or, if that be impracticable, by deputy. Default in either party subjects him to a fine of 10 francs : and a plaintiff, making default, is precluded from any further prosecution of his claim. The cost of the summons is 3fr. 90 cents. If the parties agree, a formal convention is drawn up, specifying the terms ; if they do not, a process-verbal of non-conciliation is made out, and the plaintiff is at liberty to proceed in a court of first instance.

The regular action is begun by a process, a precedent of which is given in our appendix.<sup>2</sup> This process or writ (*assignation*) must be regularly dated, and specify the names, profession and domicile<sup>3</sup> of the demandant : the appointment of his *avoué* ; the names, residence and *immatricule* of the officer (*huissier*) serving it ; the names and residence of the defendant, and a description of the person with whom (in default, it is supposed, of personal service) the process is left ; the object of the demand ; a summary statement of the grounds ; mention of the tribunal having jurisdiction of the case, and the time allowed for appearance ; all under pain of nullity. In personal actions, the defendant must be summoned before the tribunal

<sup>1</sup> For the origin of this tribunal, see our 2nd Number, p. 194.

<sup>2</sup> See Appendix to this article, No. I.

<sup>3</sup> The term ' domicile ' we cannot accurately define in a sentence or two, but see post, p. 488, 489.

of his domicile; if he has none, before the tribunal of his residence;<sup>1</sup> if there are many defendants, they may be summoned before the tribunal of the domicile of either, at the election of the plaintiff: in actions of a mixed nature, before the judge of the place, or the judge of the domicile of the defendant. Real actions are local; and the cases of partnership, succession, guarantee, &c. are also provided for in the code. The regular time for appearance is eight days; but it may be shortened at the discretion of the court, and, on special application, is generally reduced to three. On the other hand, the time is enlarged according to the distance, an additional day being allowed for every three myriameters.<sup>2</sup> The days of service and expiration of the summons are both declared exclusive in all cases. If the demand is resisted, the defendant delivers the copy of the process with which he has been served to an *avoué*, who ought to take a regular warrant to defend, but, like the English attorney, most commonly neglects to do so. When the defendant has appointed his *avoué*,<sup>3</sup> the plaintiff's is formally apprized of the appointment within the time prescribed;<sup>4</sup> and, within a certain time after, the plaintiff puts in a detailed statement of his claim (*placet*).<sup>5</sup> This is delivered to the clerk of the court, by whom it is inscribed on the roll or docketed. When a certain number have been so inscribed, the roll is carried to the president, who distributes them as he thinks best to the different sections or chambers of the tribunal. This distribution is made public by a bulletin.

The cause being thus assigned to a particular chamber, the plaintiff's statement is withdrawn, and the cause is continued to a hearing by a communication (*acte*) from *avoué* to *avoué*.<sup>6</sup> On the day named for the first hearing, the *placet* must be delivered to the clerk of the chamber, or, as is more common, left at the office of a functionary, whose name we despair of translating (*l'huissier audiencier de service*), and on the opening of

<sup>1</sup> Code de Proc. Civ. liv. 2. tit. 2.

<sup>2</sup> A myriameter is about two leagues.

<sup>3</sup> Ce qui se fera par acte signifié d'*avoué* à *avoué*. Code de Proc. Civ. liv. 2. tit. 3. The term *acte* is of constant application. It means, we believe, a communication or instrument in writing.

<sup>4</sup> Append. 2.

<sup>5</sup> Append. 3.

<sup>6</sup> Append. 4.

the court, an officer of the same species proclaims aloud the *placets* that have been entered.

To continue our sketch, we must suppose *un placet nouveau*, (that is to say, a claim brought to an audience for the first time) called on. Before the defendant is required to answer the complaint, he is entitled to take certain preliminary steps (*poser des exceptions*), one of the most common of which is to demand access to writings affecting the case, in his adversary's hands.<sup>1</sup> At this stage, too, the plaintiff is entitled to the same privilege. If the demand is admitted by the court, the party against whom it is made is allowed eight days to comply with it; after which the *placet* is called on anew, and the defendant is bound to plead to the merits (*poser qualités au fond*).<sup>2</sup> If he pleads in such a manner as to bring the cause to an issue, either by directly denying the plaintiff's claim or by stating sufficient matter in avoidance, the cause is once more put upon the roll and comes to trial in rotation. If he does not appear, or puts in an insufficient plea, judgment may be obtained against him; and the chamber may also dismiss the plaintiff's claim for insufficiency.

Indeed, the only object of these preliminary hearings seems to be the ascertaining at the outset that the plaintiff has a good *prima facie* case, and that the defendant has apparently good grounds for contesting it; for we shall presently see that the preparatory pleadings are by no means at an end when the cause is inrolled for trial, as just mentioned. In the English system, it is supposed the insufficient statements are satisfactorily provided against by the right enjoyed by the parties of calling for the opinion of the court on the legal effect of any pleading which either may deem insufficient (technically speaking, of demurring): the judge hearing nothing of the cause till the preliminary allegations are at an end, nor ever intervening "*nisi dignus vindice nodus*." In the French, on the contrary, almost every step is investigated by the court before another can be taken, and audiences and attendances are consequently very numerous. The reader, however, will be careful not to confound their plan with oral pleading, as, to the best of our belief, every communication, whether from *avoué* to *avoué*, or from *avoué* or party to the court, is made in writing.

<sup>1</sup> Append. 5. other exceptions are of the nature of dilatory pleas.

<sup>2</sup> Append. 6.

Contradictory allegations having been made at the preceding hearing or hearings, and the cause having been enrolled as described, we come to what the French lawyers call *instruction*: a term which includes all proceedings having for their object to inform the court of the circumstances of the cause. The plaintiff has already made his statement sufficiently at large: it is now for the defendant to deliver his *requête* or formal answer.<sup>1</sup> He is not, however, obliged to do so: he may suffer the cause to go to trial without further instruction on his part than his allegations at the preliminary audiences. When the *requête* has been delivered and engrossed, the *avoué* of the plaintiff receives a copy, and may, if he pleases, reply to it in writing; but he is not compellable to do this. It seems, too, that although but one regular defence is admissible, the defendant may make additional statements, if necessary, in the course of a cause; but no pleadings are allowed in taxation, except the demand, defence, and reply.<sup>2</sup>

The precise time allotted for these several stages, and the average delay occasioned by them, it is by no means easy to learn. According to the Code (liv. 2. tit. 3.) the *avoué* must be appointed within the time allowed for appearance (eight days); and, within fifteen days from that appointment, the defendant must put in his defence, signed by the *avoué*; in default of which the plaintiff may proceed to a hearing by a simple communication from *avoué* to *avoué*. Within eight days after the plea the plaintiff must reply, if he elects so to do; on the expiration of which the most diligent party (this is a literal translation) may carry the cause to a hearing by a similar communication or act; only one such act for each party being allowed in taxation. We incline to think, however, that these provisions are not strictly observed. Thus, after the plaintiff's statement has been given in and the cause distributed, a list is stuck up in the court and a cause must be published in it eight days at least before it is called on. On the day of call, only a limited number are got through; and we are told that it is very rare for the pleading to take place upon the first call after enrollment.<sup>3</sup> "If the parties

<sup>1</sup> See the form, Appendix, 7.

<sup>2</sup> Liv. 2. tit. 3. Il suit de là que rien n'empêche les parties de faire et de signifier d'autres écritures, mais c'est à leur frais et sans répétition.— De la Porte, vol. i. 95.

<sup>3</sup> Introduction, p. 54.

are ready to plead," says the same authority, "when the cause is proclaimed, it is proceeded with;"<sup>1</sup> from which we infer, that readiness is not compulsory. But the delay, for the most part, must be by consent, for it is a rule that, at any stage, either party may go on in default of the other. This may prevent dilatoriness, but it cannot exclude the mischief of incidental applications, as we shall presently have to show.<sup>2</sup>

Neither is it easy to discover what degree of accuracy and preciseness is required in the pleadings. We find it laid down that "procedure has its style, which can only be caught in the office of an *avoué*;"<sup>3</sup> again, that "great penetration is required to seize the points of a process, and consummate experience pour bien libeller (*c'est-à-dire*) motiver des conclusions : on conclusions, well or ill taken, the event most commonly depending."<sup>4</sup> Yet French pleading is not perplexed by a formal division of actions, nor tied down to a strict logic like ours. Being intended for the information of a tribunal which decides both law and fact (for jury trial is unknown in civil cases), it bears a close analogy to our equitable system, and is probably modelled on somewhat similar principles and checked in like manner by the exercise of a discretionary authority. Bills and answers, original and supplemental, come much nearer to the mode we have particularised than the self-acting system of our common law courts.

The parallel, moreover, may be extended to the mode of taking evidence and collecting other necessary information. The facts which a party wishes to prove must be set out by a simple act or instrument.<sup>5</sup> By a simple act, also, they must be denied or admitted within three days; otherwise they will be considered as confessed. If the facts thus alleged are material and issue is taken on them, the court orders an inquest (*enquête*) and names a judge-commissioner to take it; which the court may also do for its own instruction, in cases not expressly prohibited by the Code. The order must specify

<sup>1</sup> Introd. p. 56. But at p. 46, note, it is said, "*Le demandeur doit toujours être prêt à plaider.*"

<sup>2</sup> See the quotations, post, p. 499.

<sup>3</sup> Introd. p. 34. note.

<sup>4</sup> *Repertoire de Jurisprudence*.

<sup>5</sup> Par un simple acte de conclusion, sans écritures ni requête.—Liv. 2. tit. 12. "*Sans écritures*" is never to be taken literally; and when instruction *par écrit* is enjoined, it merely means more ample instruction in writing. Ignorance of this distinction has led English writers into singular mistakes.

the facts to be proved, and the judge before whom. If a witness resides at a distance, the appointment of the examining judge may be intrusted to a tribunal in the neighbourhood: if the inquiry is to take place where the order was made or within three myriametres, it shall be begun within eight days after notice to the avoué; if at a greater distance, the time is fixed by the court. The inquest is formally opened by the examining judge's fixing the day or days for the appearance of the witness or witnesses, who are to have a day's notice for every three myriametres of distance. Each is entitled to a copy of so much of the decrees as relates to the disputed facts and a copy of the examining judge's order for their appearance. The party is entitled to three days' notice, and a list of the witnesses against him, with their respective professions or callings and places of residence. The witnesses must be heard separately, and are examined on interrogatories prepared beforehand by the party requiring their testimony or his avoué; the answers are written down and read over to the witnesses, who may alter or modify their answers. The judge may put such questions as he pleases, but a party is in no case allowed to do so: like an English counsel who has closed his case, he must put his questions through the medium of the judge. A witness must give his testimony *vivâ voce*, and is not allowed to read his statement. Most of these regulations must be observed under the penalty of nullity; but the nullification of a witness's evidence does not nullify the inquest; and, if rendered nugatory by negligence, or misconduct on the part of the examining judge, the inquest may be recommenced at his expense; if on the part of the avoué, he is answerable in damages, though the examination cannot be repeated. The rules of evidence are too numerous to be stated here. On the number of witnesses produceable there is no check, except that a party producing more than five witnesses to a fact cannot recover the costs of such additional depositions. The inquiry, too, cannot exceed eight days, unless specially prolonged by the tribunal on the report of the commissioner; and even then it can be prolonged but once.

Documentary evidence is also referred to an examiner when its authenticity is denied:<sup>1</sup> the intention to contest

<sup>1</sup> See Liv. 2. tit. 11. *Du faux incident civil*, which applies when it is alleged that

is intimated by *avoué* to *avoué*; and the *avoué* receiving the intimation is bound to say, within eight days, whether he is willing to withdraw or intends to verify the deed or writing in question. If he perseveres in maintaining it, a judge after certain preliminaries, is commissioned to take the necessary proofs; but the disputed document must be first sent in to the clerk of the court, and, in case of refusal, a mode of compulsion is prescribed. If sent in, a process-verbal is drawn up in the presence of the parties and the *procureur-royal*, in which all erasures, additions, interlineations, and other particulars of the sort are mentioned. Within eight days after, the party who contests the document must notify his grounds of objection and intended proofs to his opponent, in default of which the document stands good. The producing party has eight days to reply to this in writing, in default of which the document is falsified. In three days from the reply, either party may demand an audience, at which the sufficiency or insufficiency of the allegations is decided on, as was done with reference to the original pleadings in the cause: and the issuable points are selected by the court, and ordered, by a formal instrument, for proof before the judge-examiner. Before him witnesses are examined, as in an inquest on facts: other writings are compared, and the opinions of skilful men (*experts*) are taken, when necessary, who are required to draw up a formal report. An objecting party, who makes default after his objection has been received, or fails in falsifying the instrument, incurs a fine which cannot be less than 300 fr. besides damages.

This, perhaps, is the best place to mention that an examination of either party may be ordered by the court, on the delivery of a memorial by the other stating the facts to

the instrument is *fausée ou falsifiée*. The statement in the text is taken from this, but we cannot vouch for its correctness, though it may serve to convey a general notion of the mode. The arrangement of the articles make it very difficult to understand the right order of proceedings, and we might say of several what Pailliet (p. 953) says of Art. 231: "L'esprit ne peut être saisi que par des exemples." Tit. 10. *De la vérification des écritures*, applies to cases in which the signature is disputed. The plaintiff, without leave of the judge, may require the opposite party to admit or dispute an instrument. If the defendant denies the signature, a verification "tant par titres que par experts et par témoins," before a commissioner, may be decreed. If the instrument is proved to have been made or signed by the party denying it, he is fined 150 francs besides costs. Art. 213.



which the examination is required. It takes place before the president or a commissioner appointed by him : if the party to be examined makes default, the facts in question are taken for granted : the examination is in almost every respect like that of a witness. This advantage may be had in any stage of a cause, provided it does not occasion delay.

When the pleadings are ended and all preliminary proceedings for the information of the court gone through, the cause comes to trial in its turn. The advocates are heard : the *procureur du Roi*, in cases within his province, makes his statement : the judges deliberate ; and judgment is delivered by the president. During the delivery, minutes are taken by the clerk or registrar ; and when the judgment is long and complicated, the judges themselves furnish minutes. It sometimes happens that, when the advocates have done, the court is not sufficiently informed : in this case, one of the judges is commissioned to investigate the matter and make a report, after which they give judgment. The minutes are carefully examined within twenty-four hours by the president, and the judgment must be registered within twenty days. Under the old regime, the losing party was bound to make the judges a present of sugar, sugar-plums, and comfits (*donner des épices*), but this laudable custom has been discontinued.

It is the duty of a party who wishes to enforce a judgment to prepare an act termed *qualités*, that is to say, a document containing an abstract of the case and the points decided.<sup>1</sup> This document is communicated to the opposite *avoué*, who, if he finds it incorrectly drawn, signifies his intention to oppose it ; and the proceedings are suspended till the grounds of opposition have been heard by the president, and the statement verified or corrected. When settled, it is remitted to the clerk, who makes out the process of enforcement,<sup>2</sup> by which, after another recapitulation of the grounds and particulars of the judgment, execution is ordered. But before execution, it seems, notice must be given (in technical language, the judgment must be signified) to the opposite party ; and, in certain cases, to both him and his *avoué*.

We are here supposing the sentence of the court acquiesced in. There are, however, three modes of opposing it :—

<sup>1</sup> Append. 8.

<sup>2</sup> i. e. dans le cas d'un jugement contradictoire.

1. Appeal to a superior court.<sup>1</sup> This must be made within three months from notice of the judgment, and, in order to afford the loser time to cool, no appeal can be entered till eight days after the day of the judgment. Execution is suspended (unless otherwise ordered by the court, who may order what is termed provisional execution) during the eight days of restraint, in all cases ; and, if an appeal be entered, until its determination. The only proceedings, after notice of the intention to appeal and an intimation from the opposite avoué of his being authorized to maintain the judgment, are a statement of the grounds of opposition, and a reply ; the time allowed for each is eight days. If the appellant fails, he is fined 10 francs.

2. *La tierce opposition*—is the proper remedy for one, not a party to the suit, whose interests are affected by the judgment. The court, if they please, may thereupon suspend the execution, except in case of heritable property. Failure subjects the opposer to a fine of not less than 50 francs.

3. *La requête civile*—is in the nature of a new trial. It is an application to the court to review its own decision, on the grounds of its having been deceived or misinformed ; for instance, when the judgment is contradictory in itself, or is grounded on evidence subsequently falsified, or was given in the absence of evidence fraudulently kept back. A deposit, varying with the nature of the judgment from 350 francs to a quarter of that sum, must be made to meet the costs and the fine which the court may impose on the applicant ; nor will the application be attended to unless the applicant procures a certificate from three advocates, of ten years' standing at least, to the effect that they concur in his views. Execution is not suspended by this proceeding.

An action, also, (*la prise à partie*) lies against the judge for misconduct (*dol fraude ou concussion*) or denial of justice ; and a judge is reputed guilty of such denial, who, after two applications, refuses to proceed with a cause ready and in turn for decision. The superior court to which the application must be made is empowered to reject it ; in which case, or in case of subsequent failure, the complainant is liable to a fine which

<sup>1</sup> Code de Proc. liv. 3.

cannot be less than 300 francs. If the complaint is received, the judge has eight days to put in his defence.<sup>1</sup>

We now approach the conclusion. The litigant is out of court, judgment has been passed, and the unsuccessful party is supposed to want the will or the ability to oppose it. Nothing therefore remains but to settle the amount of the debt or damages, and the costs awarded by the court; and, if withheld, enforce the payment. With regard to the preliminary settlement or liquidation, it is sufficient to say that when the amount is not specified in the judgment, the demandant gives in a statement of his claim; the defendant is then at liberty to make a tender, in default of which, or in case the tender is refused, the amount is settled by the Court. A mode is also prescribed for settling the costs, though these may be claimed in the same instrument as the damages.<sup>2</sup> In certain cases an account is decreed; the form of rendering which is also regulated by a variety of provisions, and may be enforced by seizure and sale of moveables; and even by imprisonment, if deemed necessary by the court. When the extent of the liability has been decided on, there are six modes of compelling satisfaction.<sup>3</sup>

1. *La saisie-arrêt*,—a process by which a creditor is enabled to seize in the hands of a third person a debt due from that

<sup>1</sup> Code de Proc. Civ. liv. 4. tit. 3.

<sup>2</sup> De la Porte, vol. ii. 103.

<sup>3</sup> In an article on M. Rey, in No. III. of the Foreign Quarterly Review, said to be written by an eminent Chancery Barrister, we find the following passage:—“The different modes of execution of judgment contained in the fifth book of the Code, and which are no less than seventeen, are passed over by our author in the form of a mere catalogue except as to three of those in principal use.” p. 128. This is a strange and almost unaccountable mistake. M. Rey (vol. i. 229.) says, *Le livre 5, qui renferme dix-sept titres, est consacré tout entier aux nombreux moyens d'exécuter les jugemens:*” and he then gives a catalogue of the matters to which most of the titles refer. Liv. 5., however, contains but sixteen sections or titles; the first five of which relate to steps preliminary to execution, such as liquidating or ascertaining the amount to be levied, &c. The sixth lays down certain general rules, and (to borrow M. Rey's own words) “s'applique a tout ce qui concerne ce genre d'exécution.” The 7th, 8th, 9th, 10th, 12th, and 15th, relate to the modes of execution which we have stated above. The 11th, 13th, and 14th, to the disposal of the property and proceeds: and the 16th, (the last) to the summary mode of proceeding allowed in cases of emergency. Although therefore the French lawyers use the term execution occasionally in a different sense from ourselves (See De la Porte, vol. ii. 109. who yet, in his Comment. on *la saisie arrêt*, remarks, *car cet acte est un véritable execution*), this will not afford the reviewer a loophole for escape, as

person to the debtor ; much like the London practice of foreign attachment.

2. *La saisie-exécution*,<sup>1</sup>—the seizure and sale of moveables, like our *feri facias*. Certain articles, as in the case of distress for rent with us, are exempted ; namely, the clothes of the parties, their and their children's beds, their professional books to the amount of 300 francs, machinery and instruments used in teaching or practising arts or sciences to the same amount, military uniforms, tools of trade, a month's provision for the party and his family, and, to complete the catalogue, one cow, three sheep, or two goats, at the election of the party, with straw, forage and grain enough for their litter and keep for a month.

3. *La saisie brandon*—against growing crops and fruits.<sup>2</sup>

4. *La saisie des rentes*—against rents ; which may be sold if necessary.<sup>3</sup>

5. *La saisie-immobilière*—against the land and immoveable property of the debtor, which may be sold in default of moveables.<sup>4</sup> This process is subjected to a variety of regulations ; which, according to Rey, occasion an enormous expence and afford full play to the spirit of chicane. This we can readily believe, as full notice must be given of the seizure and sale both to the party and the public ; that the interests of third persons may be attended to ; and the sale, the transfer, and the disposition of the proceeds must require a great many observances.

6. *La contrainte par corps* (arrest)—which is never allowed in France till after judgment, and, even then, not in all cases.<sup>5</sup> “ Generally speaking the judges cannot order arrest unless in the case of judgments which suppose *un tort quelconque* in the condemned person, except in commercial matters to which it is generally applicable.”<sup>6</sup> The term *tort* in this passage has not, we incline to think, the same technical meaning as with us, nor

he cannot get over the 6th and last titles. Then what excuse can he make for thus misleading the public ?—When Dr. Johnson was asked by a lady how he came to define “ pastern ; the knee of a horse,” in the first edition of the Dictionary, he ingenuously replied, “ Ignorance, Ma'am, sheer ignorance !”

<sup>1</sup> Liv. 5. tit. 8.

<sup>2</sup> Tit. 9. *C'est un véritable saisie-exécution*, De la Porte, vol. ii. 212.

<sup>3</sup> Tit. 10. De la Porte, vol. ii. 218.

<sup>4</sup> Tit. 12.

<sup>5</sup> Tit. 15. *Elle n'empêche pas la poursuite sur les biens*, Rey, vol. ii. 302.

<sup>6</sup> Rey, vol. i. 293.

are we quite competent to afford the necessary explanation. We must content ourselves with an example. Thus, where the parties to a contract have agreed beforehand on the amount of damages to be paid by the one, who shall refuse or neglect to abide by it, in other words, where the damages are liquidated, arrest is not allowed; nor can it even be stipulated for.<sup>1</sup>

We have been wont to boast of the tenderness of English law with regard to personal freedom; and it is common to suppose the French careless in this particular. How are such notions to be reconciled with the preceding statement? to which we must add, that abuse is carefully guarded against by requiring a full and explicit authority or warrant to be lodged with the jailor: compelling the detaining creditor to maintain the prisoner, who is otherwise immediately released: empowering him to regain his liberty immediately on paying the amount for which he is detained, with costs: enjoining the discharge of persons who have attained their 70th year, unless convicted of swindling; and, lastly, by releasing those who are willing to make a complete surrender of their property.<sup>2</sup> In this last particular, *benefice de cession*, the law of France was formerly severe. The surrender was to be made at the foot of the pillory, and the debtor was presented with a green cap, which he was obliged to wear away; and even now possibly they are somewhat stricter than ourselves; and with reason, as it is impossible to justify the facilities afforded to fraudulent debtors by our insolvent law, in consequence of the lax mode of executing it, if not of its express provisions. In France, the onus of clearing himself is actually thrown on the debtor; and a reasonable account of his property is rigidly exacted or a fraudulent disposal presumed. Fraudulent bankrupts, swindlers, and convicts of theft or forgery, are excluded from this provision; so also are all persons liable to account, such as guardians and trustees. Foreigners too are excluded, whatever their debts, because (in the words of the expositor, M. Berlier) the detention of their persons is the principal and sometimes the only security of their creditors.<sup>3</sup> Where the cession is allowed, ample means of publicity are resorted to.

<sup>1</sup> De la Porte, vol. ii. p. 102.

<sup>2</sup> Id. on Art. 901.

<sup>3</sup> And see the Code de Com. liv. 3. tit. 2. We hear that this exception is about to be repealed.

We are come at last to the end of our action, but have omitted or glossed over many topics on the way. Some few of these it is necessary to mention ; but we shall do little more than catalogue the incidents of French procedure, as their mode of operation may be seen in all systems and has been explained already in our preliminary remarks. It may be useful to state that by the term incidents, (*incidents*) we mean all proceedings which may occur in the course of a suit, but at the same time are not essential parts of it. This is different from De la Porte's definition,<sup>1</sup> but more easily understood and better calculated to shew the nature of procedure.

Thus a suit *may* be decided without collecting evidence, oral or documentary ; without examining the parties, requiring professional opinions, or visiting the place of dispute<sup>2</sup> (the *locus in quo* as we should call it) ; for facts may be admitted at the outset, and the case turn entirely on the application of the law. Yet the chances are that some one or other of such incidents or accidents intervenes to procrastinate the cause ; and the same may be said of the subject matters of many other titles of the code. An action may be brought by a foreigner, in which case, if required so to do, he is bound to give security for the costs and damages to which he may be condemned, or deposit the sum at which they are estimated by the court, or prove himself possessed of immoveable property sufficient to answer them. An heir, a widow, and a divorced or separated wife, being allowed three months respectively from the opening of the succession, or the separation or divorce, as the case may be, a cause may be delayed on this account, or at least, while the privilege is disputed.<sup>4</sup> So a purchaser with warranty, being entitled to make the warrantor a party to the cause, may demand a postponement for the purpose.<sup>5</sup> The same ground of action may be

<sup>1</sup> Prel. Chap. 29.

<sup>2</sup> The tribunal may send a judge to inspect the *locus in quo*. This is done by a decree preceded by a regular application, liv. 2. tit. 3. In the same manner the reports of *experts* as to value may be decreed, tit. 14.

<sup>3</sup> Liv. 2. tit. 1. This is not required in commercial causes.

<sup>4</sup> The regulation of their rights is extremely complicated.

<sup>5</sup> Like vouching to warranty in an English real action. He is allowed eight days, the time to be increased according to the distance at which the warrantor may live, tit. 4.

carried to two or more tribunals by different parties, in which case a superior court is obliged to interpose its authority.<sup>1</sup> The jurisdiction may be contested, or the party may exercise his privilege of requiring the cause to be transmitted to another tribunal, in case his adversary's relations are members of the court;<sup>2</sup> or upon plausible suspicion of partiality, he may challenge a particular judge. Sometimes, again, a party wishes to change the *avoué*, or to disavow any act or acts of his, or the *avoué* dies. Such cases are also provided for by two distinct titles.<sup>3</sup> The death of a party at an early stage gives rise to a series of regulations; but death after the cause is brought to an issue (*en état*) cannot be made a ground of delay, if the action survives.<sup>4</sup>

Though the more minute divisions are not recognised in France, actions are there divided into real, personal, and mixed. Actions real are also subdivided into, 1. *l'action pétitoire*, to regain possession of an hereditament, or charge issuing thereout: 2. *l'action possessoire*, which lies for one who is disturbed in the enjoyment of real property, or who seeks to regain possession of that which he has had and lost.<sup>5</sup>

There are also some intricate questions about the order of succession and joinder of actions. The general rule is, that actions founded upon the same cause cannot be brought separately. Neither can a man prosecute criminally for a wrong which he has before made the ground of a civil action;<sup>6</sup> and, to give an example of technical construction,—a man deprived of his land may have either of the real actions we have named, though, if he chooses the possessory action, he may afterwards resort to *l'action pétitoire*; yet after resorting to that he is precluded from adopting the other.<sup>7</sup> The defendant may form a cross demand (*reconvention*), if arising out of the same

<sup>1</sup> Liv. 2. tit. 19. Des Règlements des Juges.

<sup>2</sup> Tit. 20. Du Renvoi à un autre Tribunal pour parenté ou alliance. Copy. Art. 368. And see De la Porte, 336, 337. And see tit. 21. The causes are too numerous to quote. By Art. 386, the judge is bound to make known any of which he may be conscious.

<sup>3</sup> Tit. 17. Des Reprises d'Instances, et Constitution de nouvel Avoué, & Tit. 18.

<sup>4</sup> Tit. 17.

<sup>5</sup> De la Porte, Idée de la Just. 9.

<sup>6</sup> It is worth noticing that the civil court has cognizance of criminal matters arising out of causes, as in case of a forged deed produced in the course of a suit. And criminal judges retain civil suits in the same manner. De la Porte, Prel. Ch. 32. 33.

<sup>7</sup> De la Porte, Prel. Ch. 26.

transaction, or may set-off a liquidated sum. In fact, the law of set-off is exactly like our own, with a little more formality in its application.<sup>1</sup> A third person interested in the event may require to be made a party in any stage of a suit, even after it has gone to a Court of Appeal; but a cause at issue cannot be retarded thus.<sup>2</sup> And to obviate the necessity of such third person's subsequently appealing (by *la tierce opposition*), he may be made a party on the application of a plaintiff or defendant.<sup>3</sup>

Tedious as we are perforce becoming, the practice of amendment cannot be passed by. Generally speaking, a party on presenting a petition and paying the costs, may amend a pleading even after issue has been joined; or he may withdraw the action and bring another, which he is also at liberty to do after a judgment against him upon matter of form.<sup>4</sup> Here, too, a strong likeness to our own practice is discernible, though we incline to think ourselves a little more liberal than the French;<sup>5</sup> and a parallel might also be found for their rule that all summonses and acts of procedure are cured, unless objected to at the earliest stage.<sup>6</sup> In one respect, however the French are rather too indulgent. It seems that, after judgment by default, the defaulter may save himself from all bad consequences, by coming in and regularly protesting the matter.<sup>7</sup> This, indeed, is our own practice in case of outlawry, but then the sole object of outlawry is to compel an appearance. According to Rey, voluntary defaults have been productive of the worst consequences in France, and though liable in damages for their negligence, the practitioners are chiefly in fault. It seems that, like our Chancery

<sup>1</sup> De la Porte, *Idée*, &c. s. 2.

<sup>2</sup> Code, liv. 2. tit. 2. De la Porte, *Idée*, &c. s. 6.

<sup>3</sup> *Introd.* &c. 71. note.

<sup>4</sup> De la Porte, *Idée*, &c. s. 6.

<sup>5</sup> See our first Number, p. 22, 23, for the English law of Amendment.

<sup>6</sup> Code, liv. 2. tit. 9. Des Nullités.

<sup>7</sup> De la Porte, *Idée*, &c. s. 4. A judgment by default cannot regularly be executed till eight days after notice to the party or his *avoué*, as the case may be; and, where no *avoué* has been constituted by the defaulter, must be executed within six months, Art. 155, 156. With us, if a plaintiff lies by for a year and a day, it is to be presumed that the judgment (in a personal action) is executed, and it must be revived by *scire facias*, 2 Saund. 726, note. With reference to this note, Mr. Tidd (p. 1139, n. 8th edit.) rather quaintly remarks that "the learned editor of Saunders has followed pretty closely his (Mr. T.'s) order and arrangement."



barristers, they engage in more than they can do, and are often pleading in one court, when their presence is required in another.

It is here, too, most important to state, that all dilatory exceptions or pleas must be pleaded at once ;<sup>1</sup> and the reader will bear in mind that the French judges are vested with ample discretionary powers of regulating and quashing proceedings :<sup>2</sup> that, in cases of emergency, they may dispense with the usual forms, command a summary mode of pleading, grant an early hearing, and order execution on the instant. When immediate execution is required, the president may even hear the cause in his own room and on a fast day.<sup>3</sup> " Every man of experience must know that circumstances may arise in which the loss of a day or an hour, might occasion gross injustice and irreparable loss."<sup>4</sup>

Such, then, is French Procedure, and protracted and painful has been the labour of tracing it. Grossly ignorant that man must be, who expects to find in the Code an all-sufficient epitome of practice : who looks upon it as containing every thing which it professes to contain : as giving with precision what it actually does give ; as excluding evasive construction, or affording the slightest evidence of the possible simplicity of procedure. His views and hopes are false and vain. A long array of supplemental regulations are as indispensable as the original text : elaborate commentaries are necessary to learn the meaning of words ; preliminary debates to divine the spirit of articles : innumerable decisions to find the application of rules ; and collections of formulæ, with notes like stage directions, to get at the style and order of proceeding. From the historical deductions of Meyer and Rey, the explanatory statements of Treilhard, Bigot Préameneu, Real, Berlier, Siméon and Galli, the scientific analysis of Jousse and De la Porte, the practical learning of Pailliet, and the directions of a sort of Instructor Clericalis, which we chanced to pick up, — from these, and not from the Code, the far greater

<sup>1</sup> De la Porte, *Idée*, s. 5. The easements of heirs and widows are excepted.

<sup>2</sup> Art. 1036.

<sup>3</sup> Code, Art. 806, et seq. In the Metropolitan Court, certain days and hours are set apart for cases of emergency.

<sup>4</sup> M. Real, *Exposé*.

part of our details have been taken. Yet what are these to the commentators and reporters whom we could not or would not consult? if a task so limited keeps one occupied so long, what time would it take to become a practitioner? And here, too, we must bear in mind that there is a sort of knowledge which can only be got by routine. Parr used to say that an Athenian cook-maid would beat him in Greek; and we incline to think that an avoué's clerk would beat us in the minutiae of French practice, though we studied with care every work in our list and glanced over not a few besides. Without imputing any blame to ourselves, we can shew good grounds for thinking so; but let us first establish our preceding assertions.

The Code of Procedure came into force Jan. 1, 1807. The last article enacts that, before that time, regulations for the government of the courts, and the taxation of costs should be framed; and that, within three years at latest, such of these as required legislative sanction should be presented in form. These, of course, it is necessary to have.<sup>1</sup> The other sources of French law-learning are so concisely pointed out by Dupin, that we think it best to let him speak for himself. This celebrated jurist has published a work (*Manuel des Etudiens en Droit, &c.*) in which he lays down a course of study for each of the Codes; and in the preface he most anxiously distinguishes himself from teachers who inculcate the necessity of a great variety of books, "I leave," says he, "to the rich and curious, who are anxious to amass libraries, the care of consulting Zilettus, Struvius, Nettleblatt, Beyerus, and the two folios of Lipennius, &c. My plan is more limited: I write exclusively for students and young advocates; and in compiling a book of reference for their convenience, and adapted to their resources, *I shall only specify the works which are rigorously necessary.* I am impressed with the truth of the maxim of Pliny, *Multum legendum non multa.*" He, in short, is of the same opinion as a well known Oxford lecturer, that "the student, launched upon an ocean of law, skips like a squirrel from twig to twig, vainly endeavouring to collect the scattered members of Hippolytus."<sup>2</sup>

<sup>1</sup> See "Lois concernant l'Organisation Judiciaire Extraites," &c. par M. Dupin. Paris, 1819, 2 vols. oct.

<sup>2</sup> Williams' (Vinerian Professor) Inaug. Lect.

Proceeding upon the plan here described, M. Dupin goes on to specify such a mass of publications, on natural and national, civil and old French law, as would make a Templar start back with affright, and induce the most persevering to cry out with Spelman, *Excidit mihi, fateor, animus*.<sup>1</sup> At the fiftieth page of his list, we come to "Droit Nouveau," and meet with the following remarks :

"Before specifying the principal of these works (on a new law), it is necessary to state that each of the Codes was first printed as a project (*en projet*). This project was sent to the Courts of Appeal for their observations. These observations and the projects were next discussed in the counsel of state and the tribunal. The different titles were successively presented to the legislative body by the government-orators who have explained the grounds of them (*exposé les motifs*). This presentation was followed by reports and discourses, which have been the first and surest commentary. The Codes thus decreed, government has published official editions in three forms (in 4to, in 8vo, in 32mo.) This being premised, whosoever wishes to understand the Codes thoroughly, must have in his library,—1. The Project. 2. The Observations of the Courts upon it. 3. The Debates in the Council of State. 4. The Exposés des Motifs. 5. The Reports and Discourses. 6. The Official Edition. Besides the official edition which contains but the text, it is useful to have one of those annotated Codes which facilitate and abridge research by the means of references, either from one article to another, or to the decisions which interpret them."

We pass over the catalogue of authors on the other Codes, though these are proportionably numerous. It is quite enough for our purpose that this cautious votary of limited pursuits, (who, by the bye, has himself brought forth more than a dozen applauded volumes on legal matters) mentions ten works, consisting of twenty-three octavo volumes, on the Code of Procedure alone, as absolutely necessary, besides the sources of information particularised before; and we beg to add that many excellent works on procedure have been omitted, and that our edition of M. Dupin's Manuel is that of 1824, since which many more have appeared.<sup>2</sup> With all due deference, then, we sub-

<sup>1</sup> See the anecdote, 1 Bl. Com. 31.

<sup>2</sup> A glance at Dulau's catalogue will satisfy all doubts on this head. We find both De la Porte and Meyer, and all works on particular heads, such as the work

mit that Tidd and Archbold are trifles to these; and yet the leading law journal of Paris has just been pleased to say that the *science* of procedure is unknown in France, and earnestly recommends the study of the German writers, as capable of affording a new foundation to a branch of jurisprudence, “qui repose plutôt sur routine que sur des principes, et qui (nous hasardons l’expression) y est encore un *metier*.”<sup>1</sup>

This is pretty strong; but it is just possible for a codifier to urge that a multiplicity of authors is a doubtful proof of imperfection, and that, in a country so extensive and possessing so many courts as France, text-books and reports must always abound from the eagerness of practising lawyers to attract notice by publishing. Just so, on most branches of English law there are many more works than are wanted, and we have two set of reporters (though one for each would do) in the King’s Bench and Common Pleas, reporting generally the same points, and very often extremely diffuse.

This is a very poor come-off. The decisions of the supreme court of France occupy 28 volumes, and (most important is the fact) these volumes are but a digest. Yet to set the question at rest, to put down now and for ever the silly imputations of those who first thought their case made out by pointing to the load in our libraries, and may by and by resort to a subterfuge which they have not had wit enough to find out for themselves; with this view, and because no English writer has yet tried the experiment, we propose to shew, by details, the real nature of the causes to which the multiplicity of French law books is attributable. We can most conscientiously assure our readers that they will find nothing dry or repulsive in the argument by induction; and we beg to add that the instances are taken indiscriminately from the regulations originally composed, and those merely adopted by the framers of the Code.

The term *domicile* is constantly occurring: in particular, you find that a party is to be sued in the tribunal of his

on Nullities mentioned in a subsequent note, omitted in the *Manuel*. Part of a new work by M. Boncenne (*Théorie de la Procédure Civile*) has recently appeared, and is highly spoken of in the *Revue Encyclopedique* (tom. 1828. p. 177). Only one volume (603 pages, 8vo.) has been published yet.

<sup>1</sup> *Thémis*, tom. ix. 279, 280.

domicile, which must be stated in the summons, under pain of nullity. To ascertain the meaning of the term, you turn to the Tit. "*Du domicile*" in the Code Civil, which consists of ten articles averaging three lines each. The first four contain the definition, or rather what is meant for such : —

1. The domicile of every Frenchman, as far as regards his civil rights, is at the place where he has his principal establishment.
2. The change of domicile shall take place by the fact of actual residence in another place, with the intention of making that his principal establishment.
3. The proof of the intention shall be collected from an express declaration made as well to the municipality of the place left as to that of the place to which the domicile is transferred.
4. In default of an express declaration, *the proofs of intention shall depend upon circumstances.*

These regulations are certainly not so precise as the statutes on which the English law of settlement is built ; and of what a mass of decisions, supplemental to and interpreting express enactments, that law consists, — what litigation is hourly resulting from it, is too well known to need citation in proof. In many points, too, a close analogy is discernible. The child takes the domicile of the parent, and the wife that of the husband : a domicile may be gained by service ; and payment of district dues is reckoned an influential circumstance.<sup>1</sup> The same description of doubts are also multiplying, and very nice distinctions have been drawn in both countries. We remember a case relating to the settlement of a pauper, who had rented and lived in a house built on the boundary line of the litigating parishes, his bed being so placed as that half was in one parish and half in the other, and the judgment was literally made to rest upon the question whether the head or the tail was the nobler part of a man. The French have not, that we know of, ruled the same point yet, but we have just been reading a collection of authorities, from which M. Pailliet infers that if a house were placed on the boundary line of two arrondissements, it would belong to that in which the principal door was situate ; and it has been decided that a person, occupying a farm on one side of the river which separates the districts but having a house and establishment on the other, may be summoned where the farm is situate. In short,

<sup>1</sup> Pailliet, p. 54. et seq.

M. Pailliet's notes on the chapter on Domiciles in the Code Civil and on the bare mention of it in Art. 59 of the Code of Procedure, consist of seventy sections, each being an abridgement of authorities or digest of points. We have read these, and do not hesitate to say that the law of domicile, taking up, as we have said, but thirty lines in the Code, is already more complicated and difficult of application than our settlement law. English venues have been ridiculed —

“ At their command,

Realms shift their place, and ocean turns to land ;”

but are they so troublesome as domiciles ? or what should we think of a law requiring the parties' settlements to be stated in our writs, under pain of nullity ?<sup>1</sup>

Another set of provisions which illustrate our argument are those relating to nullity. The reader by this time does not require to be told that the non-observance of a prescribed form almost always invalidates the proceeding. One would think that nothing was wanting here but a clear specification of the observances required ; accordingly the chapter “ *Des Nullités* ” consists merely of the following clause :—

Art. 173.—The nullity of a writ or act of procedure is cured, unless propounded before any defence or exception, other than an exception of incompetency.

<sup>1</sup> The Code requires, *inter alia*, “ les noms profession et domicile du demandeur,” “ les noms et demeure du défendeur,” and “ l'indication du tribunal, qui doit connaître de la demande.” The jurisdiction, as we have said, depends, in a vast majority of cases, on the domicile of the defendant. As the mere change of residence is not enough to constitute a change of domicile, mistakes must constantly arise, although, with a view to remedy the evil, a domicile, for the purposes of jurisdiction, is presumed on less evidence than in the case of a succession. The two following cases are worth detailing :—A man domiciled at Orleans, in order to nullify a divorce suit commenced by his wife, made a declaration at Orleans that he intended to quit, and a declaration to the municipality of Sedan of his intention to be domiciled there, but still continued at Orleans. Having done this, he excepted to the process, and carried the case to an appeal. He failed ; but it would be otherwise, says Pailliet, “ si la déclaration et la translation avaient précédé la demande.” The other is an interpretation of Art. 106. which declares that a citizen appointed to a public office, temporary or revocable, shall keep his domicile, if he has not manifested a contrary intention. In explanation of this M. Pailliet cites a decision of 1742, in which it was held that the Sieur Carangeau, born at Paris and dying in Bretagne, after living there 62 years as superintendant of the fortifications, retained his domicile, because his employment was revocable, and he had declared no intention of fixing himself in Bretagne. The mistake was fatal.—Pailliet, 66. note.

*Le domicile de secours* is defined to be “ the place where a necessitous person is entitled to relief.” This is the poor settlement of France. *Id.* 54. note.

And the two general articles in the last section of the Code of Procedure, relating to nullity, are merely these :—

Art. 1029.—None of the nullities, fines, and forfeitures declared in the Code are to be looked upon as comminatory (*comminatoires*).

Art. 1030.—No process or act of procedure can be rendered null, unless the nullity is formally declared by the law.

No one but an experienced practitioner would suspect the soundness and conclusiveness of these Articles, and even an experienced practitioner could hardly foresee the multiplicity of distinctions into which this branch of law has been split. Notwithstanding the plain Chapter on Nullities, certain acts or proceedings are held *not* to cure omissions. Notwithstanding the two concluding Articles, it has been held that a proceeding is null for want of substantial formalities, though not required by the Code ; and thus the debateable ground between substance and form is laid open.<sup>1</sup> The exception of “exceptions of incompetency” has also been most elaborately refined upon. In short Pailliet’s notes to two of these Articles (173 and 1036) consist of, besides general observations, forty-eight distinct propositions, each being itself a digest ; and we have now before us the title-page of a work (in 2 vols. 8vo.) exclusively devoted to nullities.<sup>2</sup>

Again, cases *requiring celerity* are excepted from the jurisdiction of the Court of Conciliation, and may be brought on immediately, without going through the general routine ; and execution, as we have said, may be ordered on the instant. Personal appearance before the conciliation judge, also, is dispensed with *en cas d’empêchement* (i. e. if the party cannot come or chooses to say he cannot). Personal appearance certainly appears to us the essential part of the arrangement ; but the utility of that is not the question now : we are merely endeavouring to show how the credit of conciseness has been acquired by the Code. What constitutes a case of urgency or hindrance is nowhere, and perhaps could not be, specified : the courts are left free to form their own standards of both. But is it not clear that, when a court of competent authority

<sup>1</sup> The English pleader will here call to mind some puzzling cases on material and immaterial averments.

<sup>2</sup> *Traité des Nullités de tous genres, &c. avec l’esprit de l’ancien droit ; par M. Biret. 1821.*

has decided that certain circumstances justify a departure from the regular course, the decision will thenceforth be taken as a guide, and that a body of precedents must gradually grow up. English books of practice are crowded with applications of general rules and limitations of discretionary powers originally possessed by the judges, on which, from a regard to uniformity, they have permitted encroachments to be made.<sup>1</sup> Call these just what you will; embody them or not in a code: they will always be, to all intents and purposes, an operating part of the jurisprudence of the country. If, in comparing systems, such supplemental decisions are omitted on one side of the balance sheet and carefully set out on the other, the account is a palpable fraud; and we do not hesitate to say, that, acting upon the plan of reduction which has given codes the semblance of brevity, we might reduce our system a hundred-fold, at least, within a year or two, and get a perfect code of pleading in a month. Indeed, the materials for the one are already prepared, and wait for nothing but a meeting of parliament. We allude to Mr. Serjeant Stephens's excellent Treatise on Pleading, where we find the general rules, to which the author conceives the whole practice referrible, prefixed to each section, and afterwards illustrated by particular decisions.

Thus, in Sect. I. Rule I. — After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.

Rule 2. — Upon a traverse issue must be tendered.

<sup>1</sup> The cases which regulate the practice of granting new trials, changing the venue, granting copies or an inspection of papers, or additional time to plead, &c. &c. are instances of the mode in which the judges have fettered themselves by following each other. We earnestly recommend Mr. Miller to consider, before he again expresses an opinion that it would in any case be expedient to do away with all rules whatever. Let him leave such shallow reflections to Mr. Bentham, who (after ridiculing, in one part of his book, incidental applications as "causes within causes," and treating motions as the grossest absurdities) asserts that the periods of time within which each step must be taken should be specially adapted to the circumstances of each particular case; a plan which would multiply motions ad infinitum. Precedents, we repeat, cannot be got rid of; they will be looked to as aids, if prescribed as authorities; and there is sound philosophy in Mr. Simeon's remark, that "Forms, so lightly decried, occupy, in the science of the law, the same place as the formulæ, framed to facilitate the solution of problems, occupy in mathematics." We say the same of adjudged cases.



Sect. II. Rule 1. — Traverse must not be taken on an immaterial allegation.

Rule 2. A traverse must not be too large nor too narrow.

Of such rules, there are about 37, averaging two lines each, and they are generally looked upon as accurately deduced, and allowed to comprehend the whole mystery of pleading. Now, instead of fagging at a long report, on which it is said the Serjeant is employed, why does he not present his own rules to parliament and get them passed into a code? Why should he not proceed in this manner, when by so doing he makes sure of immortality; out-herods Herod, and outvies Napoleon: nay, may, if he pleases, proclaim to the world, "I will go down to posterity with a code in my waistcoat-pocket?"

One instance more, and we have done with this sort of commentary. We really regret to go on, but we are unwilling to expose ourselves to the imputation of founding an argument on insulated points; and, after showing that books may be made upon sentences or (as in the case of nullity) on words, and that general rules do not really compress, we have only to prove that the occasional attempts of the code-makers at a complete enumeration of particulars have been equally unsuccessful, and then this division of our case is made out. We take the specimen from a part of the code to which the greatest attention was palpably given and the matured results of experience were brought, in the hope of excluding all chance of mistake and not leaving room for a quibble.

In Liv. 2. Tit. 21. the grounds on which a judge may be challenged are particularized. The greater part are copied from the ordinances of 1667, and we are bound to suppose that the various constructions of which those ordinances had proved susceptible were accurately considered by the framers of the new.<sup>1</sup> We find on comparison some material alterations, which would take too long to explain; but we are induced to press the consideration of the regulations now in force, because they both answer our immediate purpose and

<sup>1</sup> For instance, commenting on Art. 6. tit. 24. of the Ord. of 1667, Jousse (an old authority) *implies* that one who had given testimony could not be judge in a cause, "et la Code consacre ici," says De la Porte, "cette opinion dont il forme une règle," vol. i. 351.

strikingly illustrate the inconveniences of local judicature; which requires to be circumscribed and guarded by the most annoying and degrading restrictions. We recommend the perusal of all, but we shall content ourselves with quoting four in the text.<sup>1</sup> A judge may be challenged —

1. If he, his wife, their ascendants or descendants, or connections in the same line, “ont un différent sur pareille question” as that between the parties.

2. If there is a deadly feud (*inimitié capitale*) between him and one of the parties.

3. If there has been, on his part, any aggression, insult, or menace, verbally or by writing, since the commencement of the suit or in the six months preceding the challenge.

4. If he has eaten or drunk with either of the parties, “dans leur maison,” or received presents from them.

These rules are translated as literally as it is possible to translate. Let us see the commentary; and, in the first place, what does De la Porte make of “*pareille question*?” Why he infers that “the judge may be refused if he has any interest, direct or indirect, in the proceeding, as partner or otherwise, i. e. if the event can in any way either benefit or prejudice him.”<sup>2</sup> These two words therefore require for their applica-

<sup>1</sup> Besides those in the text, the grounds of challenge are —

1. If the judge is related to either of the parties in the degree of second cousin. 2. If the wife of the judge is related to the party, or the wife of the party to the judge in the same degree. 3. If the judge or his wife have a cause in a court where the party is judge, or if they are debtors or creditors of one of the parties. 4. If, within five years, there has been a criminal process between either of them and one of the parties, or his or her husband or wife, relations or connections in the direct line. 5. If there is a process (of importance—De la Porte) between the judge or his wife, their ascendants or descendants, and one of the parties, commenced before the suit; or has been within six months preceding. 6. If the judge is guardian, heir presumptive, donee, master, or mess-mate of one of the parties, or if one of the parties is heir presumptive to the judge. 7. If the judge has advised, pleaded, or written, in or on the case; solicited or recommended it, contributed to the costs, or given testimony in it. Art. 378. The reader will bear in mind the immense number of judges in France, and that the *juges de paix* and, in certain cases, le *ministère public*, are within these provisions. The challenge must be put in before issue is joined; and if rejected, the party may be fined by the court not less than 100 fr. We have contradictory accounts of the practical effect of these regulations; but we know that jury challenges were very common in England, when the panel was known beforehand. A jury challenge, however, does not affect the dignity of the court. By the civil and canon law, a judge may be refused on suspicion of partiality; and it was so, in England, in the times of Bracton and Fleta.

<sup>2</sup> Vol. i. 346.

tion as great a number of adjudged cases and authorities as go to make up that part of the English law of evidence which relates to incompetency by reason of interest.

"Of deadly hatred" the code says nothing; we are obliged to seek elsewhere, and find that it will be presumed to exist if a party or his connections have capitally prosecuted the judge or his connections, or vice versa; or in case the party has killed any near relation of the judge "and in other like cases." "Cela," says De la Porte, (and acute as he is, how often does he say so), "*cela dépend encore beaucoup des circonstances.*"

("If there has been on his part any aggression, insult, or threat.") With regard to this, it is laid down that "the threat must be serious: a simple altercation or insulting expressions extorted by passion being held for nothing." This is considerate. It has been held in our law, that words of abuse and scurrility are "the privileges of the vulgar;" in France, it seems, they are the privileges of the bench.

("If since the commencement of the process he has eaten or drunk with either of the parties *dans leur maison*, or received presents from them.") It might fairly enough be argued from "*leur*," that the judge could safely ask the party to dinner, though the party could not ask the judge. It is not so: the puzzles of syntax are superseded by axioms; and the commentator rides over the law. We commend the following passages, from a very able commentary, to the reader's particular attention; as they show clearly to how great an extent the old system still prevails, and what a mass of learning may be brought to play on the new.

"In general the *liaison* (an untranslatable and very suspicious expression) of the judge with one of the parties is a good ground of challenge. (See Maynard en ses questions, liv. i. c. 80. and 93. and La Rocheffavin, liv. 13 des Parlemens, ch. 83, art. 7. See also the law 223. ff. de verbor. signif. which explains the meaning of the words *amicus* and *familiaris*. See also the *sixteenth* volume of my *Pandectes Francaises* [this beats every thing but Viner's *Ab.*], first part, the word "*ami*." Now friendship is evidenced by the frequent acts of intimacy which take place between two persons. To eat with one another is one proof of friendship. There is a decision to that effect of the 20th Feb. 1562, reported by Dufail, liv. ii. ch. 206. But this is not the only proof. If *la liaison intime* were

made out *by other circumstances*, it would be a ground of challenge, though the judge and the party had never eaten together."<sup>1</sup>

Our author then cites a decision of Dec. 12, 1588, to the effect that a judge may be challenged for supping with and giving a supper to a party, and then proceeds :

(*Dans leur maison.*) To ground a challenge it is essential that the judge and party should have eaten at the house of one of them. If they were found dining at the house of a third person, it would be no ground of challenge. If, however, this happened too often, and at the same house, it would, as leading to suspicion, be ground of challenge, according to circumstances. *The law never sanctions fraud.*

(" Or received presents,") whether for himself, his wife, or children. These presents, however, must not be of a trifling description. The old law did not consider as causes of challenge, presents of game or venison from the estate of the donor. If the judge should chance to encounter the party on a journey and permit him to pay the charges, this is a present within the meaning of the clause. This also was the construction put upon the 15th Art. of tit. 21 of the Ord. of 1667.<sup>2</sup>

These regulations speak for themselves. We hardly know which to admire most—the ingenuity displayed by the commentator, or the judicious particularity of the law by which a text is supplied him. We make these quotations to shew that no degree of minuteness keeps ingenuity long at fault, and that, with the French, "*expressum non facit cessare tacitum*;" yet, incidentally, we may be allowed to congratulate ourselves that here, at least, we have nothing to parallel. Expensive and dilatory our tribunals may be; but they know not the taint of corruption. There is, indeed, a story of Hale's refusing to try the cause of a gentleman who had sent him a buck, until allowed to pay for it; in consequence of which, the plaintiff withdrew the record:<sup>3</sup> and we have heard of a party's objecting to a judge in America, and receiving from him the lie direct; of their then resorting to trial by battle, in which the eye of the dignitary was gouged out by the litigant. But these are reminiscences, and reminiscences fast

<sup>1</sup> De la Porte, vol. i. p. 452.

<sup>2</sup> Id. 353.

<sup>3</sup> Life prefixed to Runnington's Edition of the Hist. of C. L. p. 23.

fading away : English judges are not tempted with bucks, nor American led astray by pugnacity. It is for France alone, in modern times, to expose the justice-seat to ridicule, and excite suspicion under show of averting it. To be obliged to render judges liable in damages by an express enactment, is degrading enough : they urge, however, the plea of necessity, and, possibly, that plea is admissible. Who, however, can stand up for provisions, which, though never acted on, would be a blot on the code : which may lead the way to a line of decisions, by the highest courts, on the nature of liaisons, the corrupting tendencies of dinners and suppers respectively, or the birth-place and domicile of a hare or a deer ; which might ever and anon give rise to such protests as — “ Mr. Justice A. I object to you, for you fraudulently drank tea with my adversary.” — “ Mr. Justice B. I object to you, for he sent you some venison not fed by himself.” — “ Mr. Justice C. I object to you, for he gave your wife a ring, and clearly with sinister views.” — “ Mr. Justice D. I object to you, for he paid your fare by the coach.” — And this is an operative part of “ a pure and harmonious system of jurisprudence.”<sup>1</sup>

“ *Ridentem dicere verum*,” nor gods nor men forbid ; but let no one think we are forgetting the argument in following out these somewhat ludicrous distinctions. The fool may laugh and go on : we could not teach him to think, had we all the wisdom of Solomon, and all his gravity to boot ; but the man of reflection will turn away from our instances with a deeper and more profitable impression. He will be convinced of the difficulty of anticipating contingencies, and the consequent imperfection of laws. He will know that petty refinements are fostered by knowledge and wealth. He will see the germs of interminable systems in the vaunted models of brevity : the evils of complication extending, as the tide of improvement rolls on : the energies of intellect, perverted or baffled by subtlety : the proudest productions of mind, eaten into and worn down by itself.—Such are really the prospects of France : they cannot be brightened by flattery.

We have done with the letter of the law. Let us now see

<sup>1</sup> Mr. Humphreys' Letter, p. 9.

the mode of administering it, and the spirit in which it is observed. To use a hacknied and much abused phrase, "Does the new procedure work well?"

Here, too, we are able to compare wishes and promises with facts. —

"Apprehensions are entertained that law expenses will be great. Ah! undoubtedly they will, if the simplicity of the prescribed forms is violated, if the appointed intervals become arbitrary, if the scale of taxation and rules are contemned. But why give way to alarm? Ought we to suppose that at a moment when the sovereign is zealously watching over all, even the lowest, details of administration, at a moment when men of all conditions and professions seem, as it were, fraught with his spirit, at a moment when half the globe is following the direction which he has impressed upon it, the French will be, of all others, the nation to resist *his reasonable and publicly avowed wishes*? Yes, the law will be executed; it is guaranteed to us by the genius which has constantly presided over its formation, and still more by that admiration, that love, which are making themselves a voice over the whole surface of the empire.<sup>1</sup>

This is, indeed, a precious specimen! "His reasonable and publicly avowed wishes!" As if the right hand forgot its cunning—the mind unlearnt its lore, at the mere avowal of a depot's wish!

"Ye Gods annihilate both time and space,  
And make two lovers happy"—

is generally considered as a request implying a somewhat unreasonable expectation; yet not much more so than Napoleon's; and, on coming to the reports on criminal procedure, we shall not be surprised to find there a pathetic appeal to thieves, adjuring them by their sense of honour as Frenchmen, by their love for the emperor and their regard for his fame, to refrain from picking pockets. Seriously speaking, this whole affair of the code has a good deal of humbug about it; and more than half inclines one to adopt the punster's remark, when a bas-relief of Napoleon, with the accompaniment of a triumphal car, was pointed out, — *Oui, le char l'attend!*" (*charlatan*).

To come to facts,—a more unlucky wish, expectation

<sup>1</sup> Trielhard.

or prophecy, was never pronounced. Nor do we say so hastily : the opinion is grounded on direct authentic evidence as well as on a variety of hints and allusions scattered here and there through works of authority. We must content ourselves with citing a few of the positive proofs, and shall begin with M. Rey.

“ Although the Code of Procedure has retrenched so many useless forms and writings employed in the old practice, it cannot be doubted that the foundations of the system remain unaltered. At first the *avoués* were much alarmed at the curtailments effaced by the code, which seemed to have done a great deal towards the diminution of their unauthorised gains ; and well do I remember the outcries of many ; but they soon took heart, for they saw clearly that the evil was not cut to the root, and that a fertile mine was left them to dig in. I shall enumerate some of the most prominent abuses of French practice since the code of civil procedure came into force.

“ 1. The law requires the *avoués* to give *complete copies* of writings employed in the suit, and allows a certain remuneration for such copies, the *avoués* being also entitled to be repaid for the stamped (*timbré*) paper which must be used ; but most of them deliver only the last leaf,<sup>1</sup> and, in case of objection, allege that they delivered the whole and that the first part had been lost ; which is a downright robbery, not only in respect of the copies which were not made, but also of the stamped paper which was not used.

“ 2. The law requires that each page of copy should contain but thirty-five lines ; yet the *avoués* insert as many as sixty, with a view to profit by the saving in stamped paper, and to obtain this illegal gain, they make copies which it is impossible to read.<sup>2</sup>

“ 3. In executions against immoveables, in which the code requires a certain number of placards, the *avoués* almost always cause less to be used, and charge the full number required.

“ 4. The law has fixed a certain number of lines and syllables for each page in the judgment-process ; but as the clerks have a fixed allowance for each roll (two pages), they do not insert the required number of lines and syllables, and so augment the rolls at the expense of the pleaders. But as the government also derives a profit, proportioned to the number of pages, this abuse is not complained of because complaint would be vain.<sup>3</sup>

<sup>1</sup> We on some occasions, reverse matters, and only make an incipitur.

<sup>2</sup> In which case another copy may be required.—*Introd. à la Pratique*, &c. p. 83.

<sup>3</sup> Vol. i. 280.

This hit at the government is followed up by one at the judges —

“ Another provision which aggravates the ill consequences of the former (the non-appearance of the parties themselves), is that which limits the number of *avoués* in each court, so that an understanding express or implied may always exist amongst the advocates to introduce or perpetuate abuses : and the judges, who might oppose these, being, for the most part, brought up in the spirit of the profession, either cannot see, or will not remedy, abuses.”<sup>1</sup>

The following passage occurs after mentioning the rule, authorising the most diligent party to proceed in default of the other.

“ But, in practice, the *avoués* take good care that the party shall not resort to an expedient which could only be useful to their clients.”<sup>2</sup>

The next relates to judgments. After mentioning that the code contains many provisions with regard to the mode, our author goes on.

“ In practice, the spirit of the law as to the drawing up of judgments is completely eluded ; for in place of a simple exposition of points of law and circumstances, it is customary to copy at the head of the judgment almost all the preceding writings, the mass of which we have seen already is so glaringly disproportioned to the demands of justice.”<sup>3</sup>

Again—“ I shall confine myself to a simple statement, requesting the reader to observe *that the legislator in all these proceedings carefully applies himself to restrain the number and extent of instruments, as well as the length and frequency of delays*, but that unhappily his salutary provisions have been counteracted by the fundamental vice of placing the process at the mercy of the man of law.”

One more extract we take for the sake of a conclusion.

“ In France, delays (*delais*, i. e. the respective times allowed for taking the several steps) are grossly abused, and there are lamentable facilities for exciting a crowd of incidents for the sole purpose of harassing an adversary. In a word, although this takes place in a less degree than in England, and in a different manner, they (the *avoués*) have managed to increase the costs considerably by the length of

<sup>1</sup> Vol. i. 281.

<sup>2</sup> Id. 285.

<sup>3</sup> Id. 287.



writings, the multiplicity of acts, and too often by proceedings wholly frustratory (*frustratoires*)."

This testimony would be quite sufficient: were not M. Rey most particularly liberal, and Messrs. Bentham and Ensor<sup>1</sup> (the latter of whom he is pleased to dub Sir George) his favourite authorities. Predilections of this sort certainly justify us in protesting against the comparative estimate contained in the last quotation; and may, perhaps, induce our readers to wish for confirmatory proofs. We will give them one or two. We find M. Dupin (a great stickler for French Procedure) relating, in a preface, that a certain pleader engaged against himself quoted fourteen decisions on the construction of a clause in a will; and mentioning, with the view of proving that this vicious fondness for authority is shared by the bench, a particular case of appeal in which the advocate was obliged to read a judgment extending to 52 rolls (104 pages of 35 lines each) upon any easy question relating to the nature of a rent. And though M. Dupin softens down the first by assuring us that a word from himself sufficed for the demolition of the argument, and assures us, in relation to the latter, that the chief president, "with his habitual regard for the administration of justice," took occasion to say that he would write to the presidents and request them to avoid employing such diffuse and to the parties, burdensome modes of recording — though he does mention this, such passages may fairly enough be cited in aid of M. Rey.

Definitions too frequently afford hints, and the following is certainly a strange one.

(*Qu'est ce que grossoyer?*) What is meant by ingrossing? The art of elongating words and lines, so as to take up as much paper as possible, and selling it all daubed and scribbled to the miserable suitors. But is this waste paper (*paperasse*) of the least use to the judge? Never. (*Mercier, Tableau de Paris.*)"<sup>2</sup>

<sup>1</sup> "Defects of the English Laws and Tribunals, by George Ensor, Esq. Author of National Education, National Government, Independent Man, and Principles of Morality. London, 1812."—An octavo of 507 pages, uncut copies of which may be had at the stalls for fifteen pence a-piece. All we could get from it of any use was one of his quotations, which are occasionally correct.

<sup>2</sup> Introd. à la Prat. p. 82.

We may also mention Mr. Butler's opinion, than whom few have taken greater trouble to inform themselves on every branch of jurisprudence and legislation.

"It is allowed that the first (the code civil) possesses great merit, that the third (de Commerce) is very faulty, and that whatever is good in any of them is rendered almost entirely useless by the last (de Procedure Civil), which has completely confounded and paralysed all the judicature of the country."<sup>1</sup>

It will be observed that Mr. Butler is here speaking from authority, and without pretending to draw conclusions for himself. He knows how difficult it is for a foreigner to estimate the workings of a system; and we wish French gentlemen would follow his example. When M. Rey states objections or affords hints, we receive them with gratitude; but his general estimates go for nothing with us, and we have no intentions to force ours upon him: only let any man count up the steps and writings that must or may be taken and used in France, and then compare them with our own practice, and he will arrive, we think, at a very different conclusion from that of the jurist in question. At the same time we are quite ready to admit that the French have institutions and arrangements which might be adopted here with advantage. Our numerous fictions, for instance, are particularly objectionable: they make utter nonsense of our writs, and of the heads and tails of written proceedings. What is worse, one of these, the fiction of all pleadings being oral, sets every thing like regularity at defiance, and makes legal periods dependant on chance. Now that a suit is conducted to an issue by a private interchange of writings, the intervals between the several stages of an action should be settled according to considerations of expediency, without regard to Terms, which, however, may still be kept up so far as the more formal sittings of the courts are concerned, should that be deemed advisable. We hinted this before, and merely restate it here as an illustration of the evil of fictions, which many excellent lawyers have attempted to defend.<sup>2</sup> A

<sup>1</sup> Co. Litt. 191. a. note III. 3.

<sup>2</sup> *Yorke on the Law of Forfeiture*, and *Wynne's Eunomus*. A party cannot be compelled to take more than one step a term, 1 Arch. 144.

minute inquiry into the merits and demerits of English practice, as compared with the French, will appear in our next Number, when we shall probably discuss the Commissioners' Report.

We are also quite ready to allow to M. Dupin that "the Code of Civil Procedure has simplified the forms and diminished the expense of law-suits."<sup>1</sup> Considering the almost unprecedented abuses of the old system, this is not saying very much for the new, and certainly holds out no inducement to us who are very differently situated. The French had courts, by scores, who neither could nor would assimilate their practice; we luckily have only three, who can and will get rid of discrepancies and then, most probably, go on together. Our books of practice, too, are by no means so nonsensical as strangers are fond of assuming: a vast variety of constantly-occurring combinations are satisfactorily provided for by well-considered decisions; and we should be sorry to see the legislature dabbling with these, though we would fain be rid of many obsolete, and not a few absurd, regulations. In short, we prefer chiseling, inlaying and polishing to casting anew—the tessellated pavement (if Gibbon and Mr. Humphreys will have it so) to the simple statue from the hand of an artist<sup>2</sup>—and we deprecate the years of confusion which are sure to ensue when an overgrown system is suddenly compressed. One objection, amongst many, to codes and general projects of redaction, has never been met; they necessarily change, not merely what the framer means to change, but what he means to retain.

Of this, however, much more must be said than a sentence or two at the end of an article; and, once for all, we beg to remark that the preceding statement, prolonged as it is, should be considered only as the expository part of the argument. Our details were selected and arranged without a view to controversy; and if, occasionally, the old Adam broke out, we seldom stopped to clench a conclusion. Our whole and sole

<sup>1</sup> Letter to Mr. Sampson: he adds, "No fault is found with it except relative to the form of execution (*expropriation*), the unfortunate though necessary adjunct to the law of mortgage." *Credat Judæus!*

<sup>2</sup> See the passage quoted from Gibbon, and applied by Mr. H. in his Letter to Mr. Sugden, p. 9. The comparison of a pavement with a statue is not exactly what we should have expected from Gibbon.

object, we protest, has been, to furnish a manual to be used in the coming discussion, and prepare the public for the consideration of topics which have never yet been fairly nor even intelligibly submitted to it.

### *Appendix of Forms referred to:*

[The page of the Article at which each form is mentioned is prefixed.]

#### 1. Assignment (*ante* 469.)

L'an mil huit cent vingt-quatre, le premier Février, à la requête du sieur Paul, negociant, dûment patenté,<sup>1</sup> mais non sujet à patente pour le fait dont il s'agit, demeurant à Paris, Rue —, No. 50, pour lequel domicile est élu en l'étude de M<sup>e</sup>. Jacques, avoué près le tribunal civil de la Seine, sise à Paris, Rue —, No. 6, lequel occupera pour le requérant sur l'assignation ci-après : J'ai, Nicolas, huissier près le tribunal civil de la Seine, demeurant à Paris, Rue —, No. 24, patenté le 15 Janvier dernier, 3<sup>e</sup> classe, soussigné, signifié, et en tête des présentes laissé copie au sieur Pierre, propriétaire, demeurant à Paris, Rue —, No. 7, en son domicile, en parlant à une fille à son service, ainsi déclarée.

D'un procès-verbal de non-conciliation délivré par M. le juge de paix du premier arrondissement de Paris, assisté de son greffier, en date du vingt Janvier dernier, enregistré ; à ce que du contenu audit procès-verbal le susnommé n'ignore ; et à pareille requête demeure, élection de domicile, constitution d'avoué, et parlant comme dessus, j'ai, huissier susdit et soussigné, donné assignation audit sieur Pierre à comparaître d'hui trois jours<sup>2</sup> à l'audience et pardevant MM. le président et juges composant la première chambre du tribunal civil de la Seine, séant au Palais de Justice, à Paris, dix heures du matin, pour.

Attendu que ledit sieur Pierre a souscrit au profit du sieur Paul, le 15 Octobre, 1823, une obligation sous seing-privé dûment enregistrée de la somme de 2000 fr. payable le 15 Janvier dernier.

Voir dire, ledit sieur Pierre, qu'il sera tenu de venir reconnaître pour siennes les écriture et signature de ladite obligation, sinon et faute de ce faire, que lesdites écriture et signature seront tenues pour reconnues par le jugement à intervenir, et sans qu'il en soit besoin d'autre, et se voir le susnommé condamner aux dépens.

Et, faute par ledit sieur Pierre de s'être concilié sur le principal, se voir, après les délais de la loi,<sup>3</sup> condamner à payer audit requérant ladite somme de 2000 fr., montant de l'obligation sus-énoncée, ensemble les intérêts<sup>4</sup> de ladite somme tels que de droit, à compter de ce jour, et s'entendre, en outre, le susnommé condamner aux dépens, dont distraction sera faite au profit de M. Jacques, avoué, qui la requiert, aux offres par lui de faire toute affirmation de droit ; à ce que pareillement ledit sieur Pierre n'en ignore, je lui ai, domicile et parlant comme dessus, laissé copie tant du procès-verbal de non-conciliation sus énoncé que du présent exploit, dont le coût est de 6 fr. 75 c.

NICOLAS.

<sup>1</sup> Licensed : this must be stated.

<sup>2</sup> The regular time is eight days ; it is shortened on emergencies.

<sup>3</sup> The validity of this form has been disputed ; but there are cases deciding that it is not necessary to specify the number of days.

<sup>4</sup> Whether interest can be recovered, if not specially mentioned, is still a moot point.

[On termine ainsi la copie :]

Je lui ai, domicile et parlant comme dessus, laissé la présent copie. Let coût de l'exploit est de 6 fr. 75 c.<sup>1</sup>

## 2. Constitution d'avoué (*ante*, 470).

M. Jean, avoué près le tribunal civil de la Seine,

Déclare à M. Jacques, avoué près le même tribunal et du sieur Paul,

Qu'il a charge et pouvoir d'occuper, et qu'il occupera pour le sieur Pierre sur l'assignation à lui donnée à la requête dudit sieur Paul, suivant exploit du ministère de Nicolas, huissier à Paris, en date du premier Février, présent mois.

Sans néanmoins aucune approbation préjudiciable de ladite demande, mais sous la réserve, au contraire, de tous moyens de nullité, fins de non-recevoir et autres de fait et de droit.

A ce que ledit M. Jacques n'en ignore.

d. a.

p. o.

JEAN.

[Cet acte se signifie à avoué par un huissier-audiercer, en cette forme :]

Signifié la présente copie à M. Jacques, avoué à domicile, le ——— Février, 1824, par moi, huissier-audiercier soussigné,

SIMON.

On met sur l'*original* la mention d'enregistrement suivante :]

Enregistré à Paris, le ——— Février, 1824. Recçu 55 c., 10<sup>e</sup> compris.<sup>2</sup>

BERNARD.

Distribué à la 2<sup>e</sup> chambre,  
le ——— Février, 1824. }

## 3. Requisition d'audience (*ante*, 470).

Il s'agit d'une demande en vérification d'écriture et en paiement d'une somme de 2000 fr.

Pour le sieur Paul, rentier, demeurant à Paris Rue ———, No. 50, demandeur, JACQUES.  
Contre le sieur Pierre, propriétaire, demeurant à Paris, Rue ———, No. 7, défendeur, JEAN.

Il plaira au tribunal,

Les parties n'ont pu se concilier sur le principal.

Attendue, etc.

[Ici on copie les motifs et les conclusions de la demande.]

## 4. Poursuite d'audience, (*ante*, 470).

A la requête du sieur Paul, ayant pour avoué M. Jacques,

Soit sommé M. Jean, avoué du sieur Pierre,

De comparaître et se trouver lundi, prochain, vingt-cinq Février présent mois, dix heures du matin, à l'audience et par-devant MM. les président et juges composant la 2<sup>e</sup> chambre de tribunal civil de la Seine, séant au Palais de Justice, à Paris, pour y plaider la cause d'entre les parties ; déclarant au susnommé que, faute par lui de comparaître, il sera pris avantage.

A ce qu'il n'en ignore.

d. a.

p. o.

JACQUES.

Signifié et laissé copie à M. Jacques, avoué, à domicile, par moi, huissier-audiercier soussigné.

JOSEPH.

Enregistré à Paris, le ——— Février, 1824. Recçu 55 c.

HENRI.

<sup>1</sup> It is worth remarking that this charge, like the charge for an English writ, is made up of several items ; i. e. original, 2 fr. ; copie, 50 c. ; enregistrement, 2 fr. 20 c. ; timbre (stamp-duty) 1 fr. 50 c. ; copie de piece, 90 c. ; repertoire, 10 c. The original must be registered by the officer within four days after service, under a penalty.

<sup>2</sup> The charge for this is 2 fr. 85 c., made up likewise of several items.

5. Conclusions exceptionnelles (*ante*, 471).

Pour le sieur Pierre, défendeur,  
Contre le sieur Paul, demandeur.

JEAN.  
JACQUES.

Il plaira au tribunal,

Attendu que tout demandeur doit justifier des titres et pièces à l'appui de sa demande,

Dire et ordonner qu'avant de plaider au fond, M. Jacques, avoué du sieur Paul, sera tenu de communiquer à M. Jean, avoué de sieur Pierre, soit par la voie du greffe et avec déplacement, soit à l'aimable, et sur le récépissé dudit M. Jean, avoué, la prétendue obligation en date du 15 Octobre, 1823, énoncée par le sieur Paul dans sa demande introductive d'instance du premier Février présent mois. Sinon, et faute par lui de faire cette communication, lui dénier toute audience, et le condamner aux dépens, dont distraction sera faite au profit dudit M. Jean, avoué, qui affirme les avoir frayés et déboursés de ses deniers.

JEAN.

6. Conclusions au fond (*ante*, 471).

Pour le sieur Pierre, défendeur,  
Contre le sieur Paul, demandeur,

JEAN.  
JACQUES.

Il plaira au tribunal,

Attendu que le sieur Pierre était mineur à l'époque où il aurait souscrit l'obligation dont le sieur Paul poursuit contre lui le paiement ;

Attendu que tous les engagemens souscrits par des mineurs non autorisés sont nuls, d'une nullité radicale et absolue,

Déclarer le sieur Paul purement et simplement non-recevable dans sa demande, en date du 1 Février dernier, en tous cas l'en débouter et le condamner aux dépens, dont distraction sera faite au profit de M. Jean, que la requiert, aux offres par lui de faire toute affirmation de droit.<sup>1</sup>

JEAN.

7. Requête (*ante*, 472).

A MM. les président et juges composant au la seconde chambre du tribunal civil du département de la Seine, séant au Palais de Justice, à Paris.

Le sieur Pierre, propriétaire, demeurant à Paris, Rue——, No. 50. défendeur aux fins de l'exploit introductif d'instance du ci-après dénommé, et, demandeur aux fins de la présente requête, ayant pour avoué M. Jean ;

Contre le sieur Paul, rentier, demeurant à Paris, Rue——, No. 4, demandeur aux fins de son exploit introductif d'instance, en date du premier Février dernier, et défendeur aux fins des présentes, ayant pour avoué M. Jacques ;

A l'honneur de vous exposer que plusieurs moyens péremptoires existent et concourent dans la cause pour faire rejeter la demande du sieur Paul.

Le simple exposé des faits suffira pour éclairer la religion du tribunal sur la contestation qui lui est déférée.<sup>2</sup>

Faits.—[Ici on rapporte les faits qui donnent lieu à la contestation : l'on mentionne ensuite succinctement la procédure faite par les parties, et, après cet exposé, on arrive à la discussion dans laquelle on développe les moyens que l'on emploie, et où l'on emploie, et où l'on combat ceux qu'a fait valoir l'adversaire : on analyse ordinairement la discussion avant de conclure ; enfin, on termine en prenant des conclusions.]

<sup>1</sup> The charge is 3 fr.

<sup>2</sup> The charge is 2 fr. per roll (two pages of 35 lines each) for the original, and 50 cents. per roll for the copy.

8. Qualités (*ante*, 476).

Seconde Chambre.—Audience du 4 Août, 1823.

Entre le sieur Paul, rentier, demeurant à Paris, Rue —, No. 50, demandeur aux fins de son exploit introductif d'instance, en date du 1 Février dernier, et défendeur aux fins de la requête du ci-après dénommé, en date du 15 Mai dernier, comparant par M. Robert, avocat, assisté de M. Jacques, avoué, d'une part.

Et le sieur Pierre, propriétaire, demeurant Rue —, No. 50, défendeur aux fins de l'exploit introductif d'instance, et aux fins de la requête ci dessus énoncée et datée, et demandeur aux fins de sa requête dudit jour, 15 Mai dernier, comparant par M. Vincent, avocat, assisté de M. Jean, avoué, d'autre part :

a. q. l. p. q. p. n. n. p. a. d. e. i. r. d. p.

*Point de fait.* — [Ici on rapporte, avec précision, les faits qui avaient donné naissance à la contestation ; on mentionne les actes et défenses signifiés de part et d'autre, et l'on copie les conclusions respectives des parties ; l'on pose ensuite les *points de droit*, c'est-à-dire les questions sur lesquelles le tribunal avait à statuer.]

*Point de droit.* — [Devait-on tenir pour reconnues les écriture et signature du billet dont s'agissait ?]

En conséquence, condamner Pierre à payer à Paul la somme de 2000 fr. montant en principal dudit billet.

Devait-on, au contraire, déclarer le-dit billet nul et de nul effet, comme souscrit par un mineur non autorisé ?

En conséquence, renvoyer Pierre de la demande contre lui formée.

Que devait-on statuer à l'égard des dépens ?

Le tribunal, etc.

[In our next, we shall give some French bills of costs and compare them with English.]

## ART. II.—MEDICAL JURISPRUDENCE.

IN prefixing this title to remarks upon some topics that intimately connect the two great sciences of law and medicine, we are aware that an expression is made use of, which may be objected to as inadequate or unintelligible. Unluckily, however, the vocabulary of the English language affords no better. The terms, Forensic Medicine, Legal Medicine, Juridical Medicine, are still less comprehensive or comprehensible, whilst that of Medical Jurisprudence is sanctioned by the authority of the best writers on the subjects we would treat of. It must be always difficult to invent a suitable name for a science such as this is, which indeed hardly merits to be termed one, being nothing more than a labori-

ous compilation of those physiological and pathological experiences which may best enable the medical practitioner to ascertain what were the immediate causes, or what is the precise nature of certain results submitted to his observation. Dr. Beck, in the introduction to his admirable work, has defined medical jurisprudence to be "that science which applies the principles and practice of the different branches of medicine to the elucidation of doubtful questions in a court of justice." But the science itself is one thing, the application of it another; and it may be urged, what chance is there of the Court's deciding rightly, unless some among its members possess an acquaintance with medical science sufficient to enable them to estimate the extent of the witness's knowledge, and the probability of the surmises he has formed? To this we answer, that as those medical questions that commonly occupy the attention of our law courts require, for the most part, information the most profound, experience the most extensive, and observation the most discriminating of any in the whole range of physiological science, the lawyer who would attempt to make himself competent to judge of them will have but little time for the other studies incident to his profession, and however successful that attempt, it may be doubted how far his opinion would have weight with a judge or jury as controlling or opposing that of a professional witness, whose life has been exclusively devoted to pursuits, a perfect knowledge of which is on all hands admitted requisite for the forming a correct judgment in the case. For these reasons, notwithstanding our hearty concurrence with those who urge the indispensable necessity of various acquirements to our lawyers, we yet incline to the opinion that a general idea of this miscalled science is all the legal student should endeavour at, and whilst we would urge on the medical practitioner the importance of fully mastering every topic treated of in the numerous works upon this subject, at the same time we entertain a hope that the popular view we propose to take of it may afford sufficient instruction as well as some amusement to our legal readers.

On this subject, as on all others requiring vast industry and research, Germany has been more fruitful than any country in voluminous writers. She may also claim the merit of having



preceded all her neighbours in enforcing by law the examination of medical witnesses on doubtful cases arising in the criminal courts. This edict, which formed part of the code of Charles the Fifth, framed at Ratisbon in the year 1532, would have been productive of much benefit to mankind, had its sole effect been to attract the attention of the scientific world to the important subject of medical jurisprudence. Since that period, a long succession of authors and compilers presents itself to the attention of the German student; and among them, as the most valuable and most lengthy, we may notice Bohn, Schlegel, and Plouquet. In Italy, although this science was as early cultivated as the middle of the sixteenth century, the first work that deserves commemoration is Beccaria's *Scriptura Medico Legalis*: but to our own age belongs the most illustrious name in this branch of Italy's literature, and he who wishes to attain proficiency therein may well bestow some time in perusing the *Instituzioni* of Tortosa. It may, indeed, be laid down as a rule, that nothing worthy much attention was published on this subject previous to the end of the last century, as, in common with the rest of the exact sciences, it has of late years only received that dispassionate and cautious treatment which modern philosophy has adopted as her rule; rejecting, for the sake of human happiness and truth, all amusing tale-bearing and idle speculation. Not that the elder writers do not most of them exhibit vast acuteness as well as industry, but they are one and all addicted to showing off their powers of sophistry in giving an air of reason and verisimilitude to the absurd and improbable, and they are tainted by an unluckily preference, purely scientific doubtless, for treating of the grand theory of generation in all its forms and stages, somewhat to the neglect of other matters as important, at least, to the medical jurist. We have yet to speak of the nation which has been the great promoter—which was almost the monopoliser—of this science, since it deserved the name, until the last few years. Besides the half-forgotten yet illustrious names of Paré and Deveaux, France, within the last forty years, may boast of a long list of writers, whose services, great as they have been to the science of medical jurisprudence, constitute but a small portion of their general

celebrity. From among many others well deserving notice, we may select the names of Louis, Petit, Belloc, Mare, Orfila, and, above all, Foderé, to whom after-writers have been mainly indebted for the history and illustration of this science. It will scarcely be believed, that not one tolerable work on forensic medicine had appeared in England before the publication of Dr. Male, first brought out in 1816. Since then, we have the more copious and valuable compositions of Drs. Gordon Smith and Paris — neither of them, we must take leave to say, quite worthy of the justly high reputation of their respective authors. As a writer in our language, and the native of a country whose literature and science we desire to see assimilated to our own, the American Dr. Beck may here be noticed, who, by the soundness and vigour of his style, has done more than his share to bring about this wished-for consummation. His “Elements of Medical Jurisprudence” must be admitted to surpass all other works on the same subject, and will, more than any other, form the text-book of these articles; a second edition of it, with notes and an appendix by Dunlop, was published in London in 1825.

Upon perusal of any one of the authors above mentioned, it will appear that an insurmountable difficulty presents itself, *in limine*, to each and all of them, namely, a difficulty of classification and arrangement. The reader, if he takes the trouble to run over the table of contents in Smith or Paris, will meet with many topics arranging themselves as properly under this as that head, and will perceive that almost all, however manifestly related to one division of the subject, might, under peculiar circumstances, more properly belong to another. Thus, matters coming for the most part under the cognizance of a criminal court might, in a solitary instance, engage the attention of the civil or ecclesiastical; and an inquiry into a case of death or other personal injury belongs to a different branch of the subject, accordingly as we consider the nature of the effect or the agency by which it was produced. Dr. Beck and many others have, therefore, hopelessly abandoned all idea of systematizing their observations, and in so doing, they have chosen, perhaps, the better part; whilst some, and

at their head stands Foderé, endeavour to evade the difficulty by marshalling these amphibious questions, which, being "neither fish nor flesh," no man knows where to have, under the title of *Médecine Legale Mixte*, like the ingenious person in the farce, who avoids offending the partizans of spirit or water, by avowing himself a stickler for grog. To Dr. Gordon Smith's attempt at classification must be assigned the bad eminence of incomparable absurdity; he considers the details of forensic medicine under the four heads of —

"Questions relating to the extinction of life:

Questions arising from personal injuries, not involving a fatal issue:

Disqualifications for the discharge of offices or the exercise of social functions:

Miscellaneous Questions."

As well might the Doctor, the Doctor's pen, the Doctor's subject, and the London University, be enumerated as four "classes" of one science.

In adopting the arrangement recommended by Professor Plenck, and sanctioned by the examples of Tortosa and Male, we are not blind to the many cogent objections that may be urged against it, but as we are quite convinced that classification is indispensable to the explaining, understanding, or remembering any science, we are compelled, for fault of better, to consider the multifarious topics that make up the science of medical jurisprudence under the three heads of —

Questions that arise in criminal courts:

Questions that arise in civil courts:

Questions that arise in ecclesiastical courts.

It must be but too manifest that there are many questions that may chance to arise in some two of these, or all three. Such will be considered under the head of that court in which they *most commonly* occur; — and first, of criminal questions, in other words, of personal injuries, whether amounting to the extinction of life or extending only to the violation or mayhem of the living subject. Of these, the subject of death, as producible by a vast variety of causes, requires by far the most ample consideration. Dr. Smith and others proposed to view it under the several heads of death by the act of another,

by the act of the deceased himself, or by the act of nature. These divisions are useful, but as they may all be mooted in the same trial in a criminal court for murder (for the prisoner may plead that the circumstance which casts suspicion on him will admit a more fair and probable explanation by supposing the deceased to have died by his own hand, or by the visitation of God), we prefer a more general arrangement. — We mean to adopt that which considers the subject under the heads of death by poisoning, wounds, suffocation, &c. We shall begin with the latter, confining ourselves to death by hanging or drowning. This method will enable us to bring into the closest juxtaposition the general evidence and that given by the medical practitioner in support of his argument for attributing the result to one agency, rather than to another. As we proceed it will enable us also to shew how very slight, and to how very few perceptible, are occasionally the differences of appearance, on which the discovery of the actual cause of death depends, and how necessary in consequence to medical practitioners is the study of this branch of science, as by it alone can be insured the punishment of the guilty, or the preservation of the innocent.

The most common perhaps of all the means employed to produce death, is the infliction of external wounds, and with this it may be as well to commence. It would be superfluous in this place to enter at large into the variety of directions for the examination of the dead body contained in the best books of practice. It will, of course, be perceived that where there is doubt as to the agency by which life became extinct, the minutest observation of all appearances, both external and internal, is required. It would be easy to shew by many examples, what terrible evils have resulted from the neglect to notice the most trifling circumstance in which the corpse has differed from the natural state, and how often the ends of justice have been defeated by the examiner's desisting from his labours as soon as a single corporal injury, adequate to destroy life, has presented itself. Bodies in vain submitted to the inspection of a surgeon, have been taken from the grave after many days, and a more accurate survey has traced, by marks before unseen, the immediate cause of dissolution :

a murdered man has been thrown from a precipice, or cast into a river, and hasty and unsure observers have pronounced the death accidental: on the other hand wounds or bruises fatal in appearance in those who have suddenly fallen dead from internal disorder, have given rise to the condemnation of the innocent, when a further investigation would have shewn that the destroying cause was apoplexy or intoxication. The annals of France present a melancholy catalogue of legal murders thus effected, but we trust that the superior illumination of modern science must prevent their recurrence in European countries. There are, however, some niceties of discrimination so minute in themselves, yet so important in their results, that a mention of them becomes necessary here. We quote the following useful remarks from Dr. Beck.

“ Wounds received before death are marked by red, bloody, and separated edges. Those inflicted afterwards are livid, and their edges close to each other. Similar appearances characterise contusions or blows in which there has been no solution of continuity; and on dissection they are, if inflicted on the living, found to be sub-cutaneous wounds: vessels are seen torn and fluids extravasated, and the whole exhibits the marks of tumour in its elasticity and circumscribed shape. Violence to the dead body can only produce livid flaccid spots unattended with engorgement or tumour. Gangrene also is marked by its being surrounded with a red edge; putrefaction is not, and the spots caused by the latter are of various colours.”

Circumstances under which these distinctions might have much depending on them, will be presented to the mind of every reader. To take a familiar instance, valiant Jack Falstaff could never have successfully disputed with the Prince of Wales, the honor of slaying Percy on the strength of the ‘ new wound i’ the thigh,’ had Henry the Fourth’s surgeon been acquainted with some of the differences above mentioned.

As the most puzzling of similar appearances between which it is necessary to discriminate, we may name ecchymosis and sugillation: in other words, that effusion of blood into the cellular tissue of the skin which is produced by external violence during life, and that which proceeds from the natural

gravitation of the blood after death. The former will be familiar to those who have stood near vanquished prize fighters ; the latter is commonly visible in men dying of any disorder. An accurate distinction between these is, it may be feared, unattainable : the safest has been suggested by Zacchias. In ecchymosis, or the discolouration resulting from contusion, the blood on incision will be found concrete ; but in the spontaneous spot or sugillation, fluid. This test cannot always be depended on, yet in the following case its employment might have saved the life of an innocent man.

The widow Montbailly of St. Omer, aged sixty, and of a gross habit, was addicted to daily inebriation. On the morning of the 27th of July, 1779, she was found dead in her chamber, lying on a trunk which had sharp edges. A physician and surgeon, upon examination of the body the day after, reported that they found ecchymosis and contusions upon the neck and upper part of the breast, the arms and thorax, particularly over the third, fourth, and fifth ribs. The head was swelled, the nose filled with clotted blood, and there was extravasation of blood under the skin of the face. On the eyelid was a slight wound scarcely penetrating to the orbit, which might have been caused by a sharp or cutting instrument, but could not in their opinion have produced death. On opening the body no internal injury was discernible. The reporters added their opinion that the extravasated blood, swelling of the head and ecchymosis, were occasioned by a fall or by blows, and that death had been produced either by hæmorrhage or suffocation. It was, moreover stated by a physician present from curiosity at the examination, that the eye was ecchymosed, and the wound irregular and indented.

On connecting this report with the known fact that the deceased had formerly constant quarrels with her son and daughter-in-law, the supreme court of Arras came to the conclusion that they had murdered her. Montbailly and his wife were condemned to be broken on the wheel, and on him the sentence was actually executed. A respite was granted to the woman on account of her pregnancy. During the interval, a revision of the trial being procured, the opinion of the

celebrated Louis was taken on the facts. Upon full investigation he decided, that it was much more probable that the individual died from apoplexy than any other cause. The following are some of the grounds for his conclusion. Intemperance predisposes to sanguineous apoplexy; the reporters, therefore, have neglected their duty in not opening the head of the deceased; had they done so, the condition of the brain might have explained the cause of hæmorrhage. A person predisposed to that complaint would naturally lose a great quantity of blood on falling in a state of intoxication against any sharp-edged substance; the arteries and veins of the head would be also much distended. The livid spots found on the thorax and arms of the deceased, and attributed by the reporters to blows or falling, are appearances ordinarily seen in those who die drunk. Morgagne has recorded a case in confirmation of this. A beggar, he says, going to bed intoxicated, died suddenly during the night; on dissection the scrotum was found sugillated, of a red colour, the face distended with blood, not only under the skin, but also among all the muscles. Further, the body was examined at the end of the month of July, 32 hours after death. There might have been present incipient putrefaction, which would account, perhaps, for the swelling of the head, lividness of the thorax, and other similar symptoms.

On these grounds it was Louis' opinion that there were no proofs of assassination whatever. The superior Court of Arras, in consequence, revoked their decision, exonerated the memory of Montbailly, and enjoined medical practitioners thereafter to extend their examination *to every part of the bodies* of those found dead.

In the instances where death results from wounds or blows, it is generally very difficult to trace them to the real author. There is scarcely any external injury which may not be inflicted by the sufferer himself, and a great many may be occasioned by pure accident. Gathering, however, from the direction and nature of the wound, the position of the arm producing it, some presumption may, generally, be deduced for or against suicide. If the traces of violence commence from behind, as in the case of a ball passing through the

body, entering at the back : or if the defunct to commit the act must have employed his left hand, as in the case of a throat cut from right to left, we have a strong probability against self-murder. The irregularity of the wound, if inflicted by a sharp weapon ; bruises about the rest of the body ; and other signs indicating a struggle for life, will often throw light on the question. It may be as well to quote two or three cases illustrative of these difficulties, and we will begin with one of accidental death, which to the superficial observer, presented every appearance of assassination. It occurred near Morges, in Switzerland in the year 1792.

A man in a state of excessive drunkenness left the inn where he had been carousing about 11 at night, to return to his home at the distance of half a league. The weather was cold, and the ground covered with snow. He was found dead next morning at the side of a ditch not far from his own door. A report that he had been murdered became prevalent, and *a medical man who saw the body asserted the certainty of it.* The suspected murderer was already marked out, when Dr. Desgranges, then residing at Morges, was ordered to inspect the body.

No traces of violence were found, until on turning the head from the left to the right side, there appeared an oblique wound beneath the lower jaw, and measuring externally about three quarters of an inch, and in depth a little more. The clothes of the deceased, as well as the snow on which he lay, were profusely stained with blood.

As this wound bore no resemblance to those inflicted by ordinary instruments, Desgranges was led to the belief, that the injury was caused by an auger which the deceased had taken with him from the tavern and carried under his arm with the handle backwards. This was found at the side of the man, covered with clotted blood. Upon opening the wound and inserting the auger, it was discovered to apply completely ; the size of the aperture internally was larger also, than the external appearance indicated. Further, on dissection it was ascertained that the left carotid had been wounded, and that the hæmorrhage therefrom had been the immediate cause of death. These facts seemed to decide that the



injury was accidental, and it was conjectured that in endeavouring to extract the auger on which he had fallen, the deceased had moved it round, and thus made the internal wound larger than the orifice.

In the following case which occurred at Hertford in the 4th year of Charles the First, we find a jury mistaking murder for suicide. The report of it was found among the papers of the eminent Sir John Maynard, a name familiar to our legal readers.

Jane Norcote was found dead in her bed with her throat cut. On the deposition of two females and a man, relations of the deceased who slept in an adjoining room, that she went to bed with her child the night before during the absence of her husband, and that no person entered the house afterwards, the coroner's jury returned a verdict of *felo de se*. But a suspicion being excited against the deponents, the jury, before their verdict was drawn up in form, desired that the corpse might be disinterred, which was done accordingly thirty days after death, and the jury then charged the relations with the murder. They were tried at the Hertford assizes, and acquitted so entirely against evidence, that Harvey J. suggested the propriety of an appeal, which was thereupon brought by the child against his father, grandmother, aunt, and her husband Okeman.

The evidence was as follows. The deceased lay in a composed manner in her bed, the clothes not at all disturbed, and the child by her side. The throat was cut from ear to ear and the neck broken. There was no blood on the bed saving a slight tincture on the bolster where her head lay. From the bed's head ran a stream of blood, which ponded in large quantities in the bendings of the floor. At the bed's foot was a similar stream, which likewise ponded on the floor in great abundance. But there was no continuance or communication of blood between these two streams, neither on the bed nor on the floor. It was further deposed, that on turning up the mat, clots of congealed blood were found in the straw underneath. The bloody knife was found sticking in the floor a good distance from the bed, with the point towards, and the haft from it. Upon the haft was a print of the thumb and four fingers of a left hand.

The accused were all found guilty except Okeman, and suffered death without making confession.

There occurred upon this trial a circumstance so extraordinary, that we cannot forbear quoting it upon the authority of Maynard, who pledges himself for the even verbal accuracy of his report. "An ancient and grave person," says he, "minister to the parish where the fact was committed, being sworn to give evidence according to custom, deposed, 'That the body being taken up out of the grave, thirty days after the party's death, and lying on the grass; and the four defendants being present, were required each of them to touch the dead body. Okeman's wife fell on her knees, and prayed God to shew tokens of her innocency. The appellant did touch the dead body, whereupon the brow of the dead, which before was of a livid or carrion colour, began to have a dew or gentle sweat arise on it, which increased by degrees, till the sweat ran down in drops on the face; the brow turned to a lively and fresh colour; and the deceased opened one of her eyes and shut it again, and this opening of the eye was done three several times. She likewise thrust out the ring or marriage finger three times, and pulled it in again, and the finger dropped blood from it on the grass.' Sir Nicholas Hyde, chief justice, seeming to doubt the evidence, asked the witness, Who saw this besides you?—Witness. 'I cannot swear what others saw, but, my lord,' (said he), 'I do believe the whole company saw it, and if it had been thought a doubt, proof would have been made of it, and many would have attested it with me.' Then the witness observing some admiration in the auditors, spoke further. 'My lord, I am minister of the parish, and have long known all the parties, but never had occasion of displeasure against any of them, nor had to do with them, or they with me; but as I was minister, the thing was wonderful to me. But I have no interest in the matter, but as called upon to testify the truth, and this I have done.' (This witness was a very reverend person, as I guessed of about seventy years of age. His testimony was delivered gravely and temperately to the great admiration of the auditory). Whereupon, applying himself to the chief justice, he said, 'My lord, my brother here pre-

sent is minister of the next parish adjacent, and I am sure saw all done that I have affirmed.' Therefore that person was also sworn to give evidence, and did depose in every point — 'the sweating of the brow — the change of the colour — the thrice opening the eye — the thrice motion of the finger, and drawing it back again.' State Trials, vol. 10. Appendix, No. 2. p. 29.<sup>1</sup>

There are two cases, one of probable homicide, the other of probable suicide, which, as they engaged the attention of all England at the several periods of their occurrence, we cannot quit this subject without noticing. We allude to the deaths of the Earl of Essex, and Sellis, the servant of the Duke of Cumberland. The nobleman was easily exonerated from the charge of self-destruction, because public opinion ran strongly in his favour: because it is equally hostile to the Prince, dark suspicions are still entertained by many ignorant and well-meaning persons, in defiance of evidence irresistibly demonstrating their absurdity. We shall give both cases without comment.

The Earl of Essex, committed to the Tower in July 1683, on a charge of high treason, was found in his closet a few days after with his throat cut. The jury (who, by the way, on desiring to see the clothes, were told, that on the body, not the clothes, they were to sit) gave their verdict, "That with a razor the Earl of Essex gave himself one mortal wound, cut from one jugular to the other, and *by the aspera arteria* and the windpipe to the vertebræ of the neck, both the jugulars being thoroughly divided, and of this he died." Burnet in endeavouring to prove the suicide, directly contradicts this. "Both the jugulars and gullet were cut," says he, "*a little above the aspera arteria* ; and when his body was brought home to his own house, and the wound was examined by his own surgeon, he told me it was impossible the wound could be as it was, if given by any other hand but his own ; for except he had cast his head back, and stretched up his neck all he could, *the aspera arteria must have been cut.*" The reader,

<sup>1</sup> This mode of trial was formerly very common. Most of our readers will remember the scene in the last series of *The Tales of the Canongate*, where the murderer Bonthron is required to touch the dead body of the bonnet-maker.—*Edit.*

with ourselves, will incline rather to believe the jury than the bishop, and it may be observed that cutting the gullet *above* the aspera arteria is nearly impossible. Several skilful members of the faculty, on examination before the Lords' committee, stated, "that they would not positively say it was impossible for my Lord to cut his throat through each jugular vein, the aspera arteria, and gullet to the neck bone, and even behind each jugular vein on each side of the neck, as some judicious surgeons who viewed the throat had reported it to be cut, but this they would be very positive in, viz. that they never saw any man's throat so cut, that had been cut by himself, and they did believe that when any man had cut through one of his jugular veins, and the gullet and windpipe, and to the very neck-bone, nature would be thereby so much weakened by the great effusions of blood and animal spirits, that the *felo-de-se* would not have strength sufficient to cut through the other jugular." Further, it may be mentioned, that there was no blood higher than the floor of the closet in which the body lay, although only three feet, two inches, wide; the razor was of such shape, that it must have been held by the blade, which much increases the difficulty of inflicting so large a wound. It lay on the left side, although Lord Essex was right-handed; and two witnesses swore that his cravat was cut in three pieces, and that there were five cuts on his right hand.

The evidence of Sir Everard Home, indicating that Sellis committed suicide after attempting the life of the Duke of Cumberland, has been frequently before the public. We give it in his own words. "I visited the Duke upon his being wounded, and found my way from the great hall to his apartment by the traces of blood which were left on the passages and staircase. I found him on the bed, still bleeding, his shirt deluged with blood, and the coloured drapery above the pillows sprinkled with blood from a wounded artery, which puts on an appearance that cannot be mistaken by those who have seen it. This could not have happened, had not the head been lying on the pillow when it was wounded. The night ribbon which was wadded, the cap, scalp, and scull were obliquely divided, so that the pulsations of the arteries of the

brain could be distinguished. While dressing these wounds, a report came that Sellis was dead; I went to his apartment, found the body lying on his side on the bed, without the coat or neckloth — the throat cut so effectually, that he could not have survived a minute or two. The length and direction of the wound was such as left no doubt of its being given by his own hand: any struggle would have made it irregular. He had not even changed his position—his hands lay as they do in a person who has fainted; they had no marks of violence upon them — his coat hung upon a chair out of the reach of blood from the bed — the sleeve from the wrist to the shoulder was sprinkled with blood quite dry, evidently from a wounded artery, and from such kind of sprinkling the arm of the assassin of the Duke of Cumberland could not escape." Unless, says Dr. Gordon Smith, the *veracity* of this statement be impeached, what can be more conclusive than the inferences that naturally present themselves? This question ought, indeed, to be set at rest by Sir E. Home's declaration, and an admirable lesson is thus furnished on the importance of medical investigation in cases of difficulty and doubt.

Suffocation, if we include under that term for purposes of convenience, such various modes of death as hanging, drowning, strangling, and smothering, is perhaps of all the subjects treated of in medical jurisprudence, the one requiring most explanation. It is not going too far to state that not one educated man in a hundred is acquainted with the symptoms that generally accompany death, produced by suspension or immersion, and that still fewer could point out the place or nature of the functional derangement which extinguishes life in such cases. It is far from uncommon, even in this enlightened generation, to hear of unfortunate persons hung up by the heels, or rolled on casks, after they have been taken from the water in a senseless state, in order that they may perforce disgorge the liquid which they are assumed to have swallowed in large quantities; whereas it very rarely happens, that the stomach or lungs of a drowned person contains much or any of the fluid in which he has been immersed, and in no case whatever is the presence of such fluid to be esteemed the cause of death. The effects of

hanging are as much misunderstood; the party dying, as in drowning, from mere privation of air. Coleman and Curry have given ample demonstration that the actual cause of death in both these cases is asphyxia; but as it is more consonant to our subject to select a legal instance, we take one from Senac, who describes the following mode of torture, practised at Paris in his time, and under which the subject occasionally died. "The mouth being kept forcibly open by a wedge, and the nostrils closed, water was poured into the throat. The irritation of the trachea in resisting the access of the unsuitable fluid, while respiration was prevented, caused faintings, convulsions, violent agitation of the respiratory organs, rupture of the pulmonary vessels, spitting of blood, &c.; but very little water entered into the lungs or the stomachs of these unfortunate people, in whom the usual lesions of parts, as in death by submersion, were found on dissection." There is an extraordinary variety of appearance discoverable in drowned persons, owing to the various modes in which death may have taken place. Some faint immediately upon submersion, and in these extreme paleness is discernible: others perish by suffocation, a small quantity of water entering the bronchiæ, and the lungs: in these the most distinguishing characteristic is a frothy and sometimes bloody mucus filling the mouth. Others again die in a sort of apoplexy; respiration being suspended, the heart drives the black blood to the head; with these last there occur lividness and swelling of the face. Now it will be manifest to the merest tyro in medical science, that all these symptoms may be exhibited in death from other causes. The unnatural pallor is common to cases of syncope; the frothy mucus to suffocation of whatever kind — to epilepsy, apoplexy, or to death from irrespirable gases — the livid loaded appearance of the face attends all diseases in which the cerebral vessels are gorged with blood. We cannot, therefore, from the presence of any of these signs, pronounce with certainty that the party was drowned. Again, much stress has been laid upon the fluidity of the blood, which is sometimes increased in the most remarkable degree; but this symptom is equally detected in those who perish by noxious inhalations, or

poisoning with opium. We cannot better illustrate the extreme difficulty of the problem above proposed than by the celebrated case of Spencer Cowper. This gentleman was a member of the English bar, tried at Hertford assizes, in 1699, for the murder of Mrs. Sarah Stout. Mr. Cowper came to Hertford on Monday, the 13th of March, and shortly after visited Mrs. Stout, who lived with her mother of the same name. He dined with them, and stayed till four in the afternoon. When he went away, he promised to return there and lodge that night. Accordingly, at nine o'clock, he arrived, ate some supper, and engaged in conversation with Mrs. Stout, the daughter. They were alone in the room when she called a servant, and desired her to make a fire in his chamber, and to warm his bed. The direction was attended to, and in about a quarter of an hour the servant heard the door shut, as if some one was going out. She remained above about a quarter of an hour longer, and then came down into the room. Mr. Cowper and Mrs. Stout were both gone, and the next morning she was found dead, and *floating* on the water. Its depth was about five feet, and her body was about five or six inches under it, although some of her clothes were on the surface. Her eyes were open, and *some little froth issued from the mouth and nostrils*. The body was not tumified, nor any bruises observed. Such was the testimony of the individuals who took the body out of the water.

Mr. Dimsdale, a surgeon, was sent for to view the body. He found both sides of the neck swelled and black, and the skin between her breasts, up towards the collar bone, was also dark coloured. The left wrist was slightly bruised. There was, however, no circular mark round the neck. The investigation proceeded no farther. Six weeks after death the body was disinterred for purposes of inspection. No farther discovery was made, but upon incision, it appeared there was *no water in the lungs, stomach, or intestines*.

Drs. Coatsworth, Nailor, Burnet, and Woodhouse, with Mr. Babington, a surgeon, deposed that when a person is drowned water must be taken into the stomach and lungs; and as none was found in this case, they were of opinion that she came to her death by other means.

On the part of the accused, it was first attempted to be shewn, that the peculiar position of the body was owing to its lying sideways against some stakes in the river. These prevented its complete submersion; and a witness also mentioned that in drawing the body out of the water, one of the arms rubbed against the stakes, and thus probably produced the injury discerned on it.

Drs. Sloane, Garth, Morley, Wollaston, and Corell, with Wm. Cowper, the celebrated anatomist, appeared as witnesses for the prisoner. They were asked concerning the circumstance of no water being found in the body, and whether this disproved the drowning. Doctor Sloane considered it altogether an accidental appearance in the stomach, and not necessarily present in such case. The others advanced similar opinions. As to the fluid in the lungs, the answers were not very definite; but some insinuated that the six weeks' burial might have dissipated whatever was taken in.

The prisoner was acquitted.

Upon this trial a question was raised, whether dead bodies will float upon being thrown into the water, and a sailor swore that he had seen dead men float when thrown overboard at sea. The custom of attaching weights to the corpse was urged in confirmation of this. It is now well known that the human body being of greater specific gravity than water, will always sink at first, but that, as air is generated in the process of putrefaction, it will afterwards, unless properly loaded, rise to the surface. Every one remembers the shocking story of the murdered Caraccioli rising erect from the ocean, before the eyes of the King of Sicily while walking the deck of Lord Nelson's ship. There was nothing extraordinary in that occurrence except the perpendicular attitude assumed by the corpse, arising from the action of the shot attached to his feet, which, although not sufficiently heavy, prevented the body floating in the usual horizontal position, and not, as some have fancifully urged, from the mode of Caraccioli's execution, namely, strangling, which, by distending the lungs with air, imparted a sustaining power to the thorax.

Where there is sufficient evidence to point out drowning as



the probable cause of death, the minor difficulty will often arise, whether it was accidental, voluntary, or effected by the violence of others. In this doubt the medical practitioner can be of little assistance, and the proof must rest on other grounds. The following instance of a most improbable suicide would, but for a trifling circumstance, have been accounted murder by every rational man. In June, 1816, the body of a gauging-instrument maker, who had been missing for some days from his home, was discovered floating down the Thames. On being taken out, his wrists were found tied together, and made fast to his knees, which were in like manner secured to each other. The cord with which he was tied was recognized *as one that had hung from the ceiling over his bed*, and the jury accordingly returned a verdict of "found drowned."

In the symptoms attending death by hanging, there is frequently a strong resemblance to those we have already noticed as incident to drowning. The medical jurist has also the same difficulties to contend with; first, in ascertaining whether the extinction of life occurred previous or subsequent to suspension; and, secondly, in deciding by whose agency it was effected. It was for a long time supposed that an infallible test had been discovered for the resolution of the former question from the presence or absence of ecchymosis on the neck; which, as we before observed, can be produced only by violence offered to the *living* subject. But M. Esquirol has recently shown, that where the person has been suspended in full and healthy life, ecchymosis is sometimes altogether wanting. His reasons and examples may be found in an article of the Archives Generales de Medicine, January, 1823. We must, therefore, be content to believe that whenever the neck is not ecchymosed, the individual was *probably* dead before suspension, and also that the appearance of two discoloured circles, or of one at the lower part of the neck (the cord always slips to the upper part in a suspended body), are proofs of a strangling before the hanging. As illustrative of the importance and truth of these tests, we may instance the following cases.

"A female of Mantes, aged fifty, was found suspended from

a beam in a barn. The face was not discoloured, no froths issued from the mouth or nose, the tongue was natural, there was no change of colour around the shoulders, *nor was the neck at all ecchymosed*. It was, therefore, determined to examine the body more minutely, when a small wound penetrating to the heart was discovered under the right breast." Thus a case of apparent suicide was discovered to be murder.

The other case is of a similar description. Bartholomew Pourpré, aged 18, was discovered hanging on a tree near Aix, on the 12th of August, 1736. A statement of the suicide being carried up by their order to the parliament of Aix, the attorney-general was led to believe from the deposition of the examining surgeon, that the young man had not destroyed himself.

It appeared also from other witnesses that the mark of the cord, instead of being at the upper part of the neck *was at its lower*, just above the shoulders; and, secondly, that the teeth were knocked in and bloody. Coupling this with the known fact that repeated quarrels and threats of murder had passed between the deceased and his father, a man of 52, the parliament decided that the latter had strangled his son, and had put his foot upon his mouth, either to prevent his cries or accelerate the strangulation. The suspension they declared subsequent to death.

The presumption against homicide, when it is clear that the sufferer perished by no other cause but hanging, must be always very great. Few murderers would employ a mode of destroying life, perhaps more easily resisted than any, unless the assailants be very numerous and powerful. Suicides, on the contrary, find it the most practicable means of casting off their weary load, and one to which they screw their courage with least effort. The materials for the fatal noose are soon obtained by the poorest and most carefully watched, and a beam, a bedpost, or a bough is all that is needed to consummate the crime. There is a slight probability in cases of homicide, that the rope will be contracted into a smaller circle, because the *felo de se* must trust solely to the effect of his own weight in tightening it. The diameter of the circle described by the cord is stated by Mahon to have been only two inches,

in a case of assassination which he witnessed. But the same effect would be in some measure produced by the suicide's throwing himself from any great height. We cannot refrain from giving, before we quit this subject, a brief account of that judicial murder which, through the indignant efforts of Voltaire, once attracted the attention and commiseration of all Europe.

John Calas, a merchant of Toulouse, 70 years old, had the misfortune to be virtuous and a protestant. His son, aged 28, and gifted with some personal advantages, had long before the fatal event we relate, been remarkable for a melancholy turn of mind. Irritated, as has been conjectured, by the difficulties he met with on account of his religious persuasion, when seeking to obtain a licence for practising law, he resolved to hang himself. This he accomplished by attaching a cord to a billet of wood placed on the folding-doors between his father's shop and store-room. He was found lifeless two hours afterwards. The parents naturally enough avoided exhibiting his body, or proclaiming the manner of his death. But the people, stimulated by sectarian animosity, violently seized the corpse and carried it off to the town-hall. Two medical gentlemen examined it next day, and without viewing either the cord or the imputed place of death, pronounced that the young man had been strangled. On this authority the parliament of Toulouse condemned John Calas to be broken on the wheel. He died protesting his innocence before Heaven.

At length, although too late, reflection came. The melancholy habits of the son were recalled to recollection. The silence through the house whilst the deed was doing; the unruffled appearance of the clothes; the single mark of the cord, which was exactly that which suicide produces: these were all remembered. It became known, too, that a dress proper for the dead had been found laid out on the counter. The cause of the injured family was espoused by the terrible Voltaire. An appeal was carried up to the council of state, who, on the 9th of May, 1765, reversed the previous decree, and vindicated the stained memory of John Calas.

In our next number we shall enter at large upon the ample field of death by poison. It has and will continue to be seen

that these papers make little or no pretence to originality. Our sole endeavour, and that, perhaps, implies presumption, is to present the most condensed information, in the most entertaining form we can, on the vast subject of medical jurisprudence.

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ART. III. — MERCANTILE LAW.

No. III.

HAVING now surveyed the nature and general properties of the principal transactions of trade, in their relations to each other, and their connection with a whole, we proceed, as was proposed, to reconsider them in detail, with reference to those municipal regulations, by which they are severally modified, controlled, or enforced. Yet we cannot help pausing for a moment on the threshold, whilst we endeavour to impress on the mind of the student (for whose benefit these elementary dissertations are mainly intended) a few plain but important principles as to the object, business, and character of law in its application to the mutual dealings of men in their ordinary intercourse with each other. Nor let him despise as commonplace, what appears self-evident when enunciated; but let him remember that *that* is not a principle, which requires demonstration, and that to be simple and easy of apprehension is the universal character of truth. Indeed a little deeper reflection will teach him, that without a familiar acquaintance with the axioms, on which the system rests, he can neither justly appreciate it in theory, nor apply it correctly in practice.

Let it be borne in mind then, that there are certain rights of man in society, which are not created, but merely protected by law. Such is the right of him, who, at the request of another, bestows his labour or the produce of it for his benefit, to receive from that other a compensation or equivalent in return. It is evident that this is a right which does not derive its force from any positive declaration of mere human authority, but springs at once from that state of equality in which men are placed, if not by nature, at least by the primary and constituent principle of society.

In England this equality of civil rights is fully recognized ; and the business of law therefore, as applicable to these, is simply to give effect to natural justice by preserving or restoring that equality. This it endeavours to accomplish, either by way of prevention, imposing wholesome checks on the evil passions and selfish desires, which are continually tending to disturb it, or by way of remedy, compelling a compensation, when it has been disturbed. Redress of wrongs, adjustment of differences, correction of injustice, and other expressions of the like kind, are merely varieties of phrases signifying the restoring of equality. To give one simple illustration. A nobleman employs a coachmaker to build him a carriage ; i. e. to bestow his labour and his goods for his benefit. Now, whatever may be the difference of rank and political privileges between the parties, there is none in respect of this particular transaction : they deal on a footing of perfect equality, and the nobleman must give in return a benefit equal to that which he receives. Suppose then, that, having obtained the carriage, he refuses to pay what it is worth ; it is plain that the condition of equality is destroyed, and that one has an advantage over the other. The law therefore steps in to adjust the difference, and by compelling the payment, restores the equilibrium.

Law then, as regards the ordinary commerce of men, is a collection of rules, having for its object the maintaining of equality, or, what is the same thing in other words, fair dealing and justice. These rules at first are few, simple, and very general. But to adapt them to the infinite diversity of cases, which in the progress of society are continually arising, it is soon found necessary to qualify, limit, or extend them, until they branch off into a multitude of subordinate rules, severally applicable to particular classes of facts. Again, the application of a general rule to some particular case may sometimes militate against an established principle. The most important must then prevail ; and hence examples of one rule not unfrequently become exceptions of another ; and even with this continual multiplication of rules, accommodated as far as possible to the ever-varying combinations of circumstances, such is the imperfection inherent in the very nature of legislation, that it is impossible for the most perfect code to be provided

with a remedy, exactly appropriate to every case which may occur. But where law stops, equity begins : and tribunals are established in this, as in every other highly civilized community, proceeding however not arbitrarily, but upon settled principles of conduct, for the purpose of supplying this deficiency, and enforcing that equity which is beyond the reach of law.

With these preliminary observations we enter at once upon the more immediate subject of our enquiry ; and first in order comes the contract of sale with its incidents. But the slightest glance over our last article will shew that contracts of various kinds enter into every part of commercial dealing. It will therefore save much repetition, if we begin with a comprehensive view of the legal qualities of contracts in general.

The law of England leaves every one, who has the power of choice, at liberty to form whatever engagements he pleases, and for the most part requires the fulfilment of them, so long as they are not at variance with the general interests of society, or unfairly prejudicial to those of individuals. We do not say in all cases, because there are certain classes of persons, whose rights are not recognized by the law, and in whose behalf it refuses to interfere. Such are the subjects of a foreign state in open hostility with our own, technically styled *alien enemies* ; and such are persons outlawed, and attainted of treason or felony. These, so long as the disqualification continues,<sup>1</sup> are disabled from suing in our courts, and consequently from compelling the performance of any engagement entered into with them, either before or subsequently. Yet this disability does not exempt them from liability to the claims of others ; for it is apprehended that even an alien enemy, if amenable to the jurisdiction of the court, may be sued upon a contract, made before the commencement of hostilities.<sup>2</sup>

<sup>1</sup> In the case of an alien enemy, the disability does not attach if he come into this country under letters of safe conduct, or trade by licence from the crown. It is removed also in his case by the cessation of hostilities, and in the case of outlawry and attainder by reversal and pardon.

<sup>2</sup> The invalidity of the contracts of alien enemies, made in time of war, does not arise, as is erroneously supposed, from any incapacity in them to contract, but from a notion that such agreements are contrary to public policy, a topic which belongs more properly to another division of our subject. Neither are persons outlawed or attainted, correctly speaking, incapable of contracting, but rather of deriving personal benefit from the contract.

Civil engagements pervade the whole system of society,<sup>1</sup> but our present enquiry will be limited to those which have in view a direct interchange of commodities, money, or labour. These, which from their reciprocity have received the name of contracts, have been classified as follows : 1. Stipulations mutually to give : 2. Stipulations mutually to do or forbear to do : 3. Stipulations on the one part to give in consideration of something to be done or forborne, and on the other to do or forbear in consideration of something to be given.<sup>2</sup> Under these three heads all the various contracts, which come under the cognizance of municipal law, will be found to range themselves. Now these compacts may be formed, either by the express agreement of the parties, in which the terms are settled by mutual consent ; or the benefit may be conferred by the one and enjoyed by the other, without any express stipulation for a return. In the latter case, the law, presuming that what reason and justice dictate was also intended by the parties, supplies the formal words of contract, and by an equitable fiction supposes the party benefited to have promised an adequate compensation. Thus, if I order a coat from my tailor, or he send me one home, and I choose to wear it, without any stipulation as to price, the law considers me as having undertaken to pay him whatever sum it is reasonably worth. But where there is an express agreement, it interferes no further than to require the performance of the contract, in the terms upon which it was concluded. These may be unequal ; yet the law, wisely considering that the adjustment of equality may be safely left to the opposing interests of the parties,<sup>3</sup>

<sup>1</sup> The Roman lawyers classed all the relations of civil society into obligations *ex contractu*, or *ex quasi contractu*. We are in general averse to definitions : but if we were disposed to define a contract, it would be thus : A mutual engagement, voluntarily and deliberately entered into, between two persons at least, to do something beneficial each for the other. One advantage of this definition, which we shall not stop either to justify or explain in detail, is the separation of the contract into two distinct engagements, whereof both may be void, or the one may be binding and the other not, according as both, or either, are wanting in some of the legal requisites.

<sup>2</sup> This classification is adopted from the civil law : 1. *do ut des* : 2. *facio ut facias* : 3. *do ut facias* : 4. *facio ut des* : the only alteration being that we have united the two last, of which one is evidently the converse of the other.

<sup>3</sup> The maxim of the civil law is "*contractus legem ex conventionem accipiunt*." Ours is still stronger : "*modus et conventio vincunt legem*." It must be recollected that the implied obligation in all cases gives way to the declared. "*Expressum facit cessare tacitum*."

merely says, "*Fides est servanda.*" "You must do what you you have stipulated to do, or render an equivalent."<sup>1</sup> Thus contracts are distinguished into *express* and *implied*, and both are equally obligatory in law.

It follows from what has been already said, that in every contract, whether express or implied, there must be an agreeing between two parties at least, and a reciprocity of benefit ; i. e. something to be done on the one hand, and a consideration for doing it on the other. The subject, therefore, naturally divides itself into the *act of agreeing*, which includes of course the parties ; the thing agreed, and the consideration.

But before we enter into the detailed investigation of each of these topics, it may be as well to premise, that agreements,<sup>2</sup> in form, may be made either by word of mouth, or by writing, or by the formal sealing and delivering of a written instrument, or by a solemn acknowledgment, made before a competent judicial tribunal, and placed upon record. The two first of these are classed under the same head, the only distinction, recognized by the common law, being between agreements by

<sup>1</sup> The common law of England exerts no authority to compel the specific performance of an agreement. It merely takes cognizance of the wrong done by the non-fulfilment of it, and calls upon the wrong-doer to make good the loss, which may have been occasioned to the other party by his breach of good faith. In many cases, however, it is obviously desirable that the agreement should be literally performed in kind. Here, therefore, the courts of equity step in, and supply the defect of jurisdiction by decreeing and enforcing a specific performance. It may be worth remarking that the compensation assigned by the courts of Common Law, for all violations of contract, is a sum of money, not unaptly called the *damages* : money being selected as the most convenient measure for estimating the quantum of compensation. We may also take this opportunity of noticing an inaccuracy (though not a very important one) of Blackstone on the subject of implied contracts. "There is also," he says, "one species of implied contracts which runs through, and is annexed to, all other contracts, conditions, and covenants, viz. that if I fail in any part of the agreement, I shall pay the other party such damages, as he has sustained by such my neglect or refusal." Com. vol. ii. p. 443. The learned commentator has evidently mistaken a remedial consequence annexed by the law, for an implied undertaking of the party.

<sup>2</sup> We are not unaware that the term "agreement" will be found employed in the course of this inquiry in two different senses, one as expressive of the act of agreeing, and the other of the whole effect and result of that agreeing : it is in this latter sense that it is frequently used to denote the instrument which attests the contract. This inaccuracy must be imputed to the imperfection of language, not the fault of the writer : for, however much we may regret it, it seems better on the whole to adhere to the customary modes of expression.



*parol* or simple contracts, which comprehend the two first, agreement under *seal*, technically called *deeds* or *specialties*, and agreements of *record*. It is evident that these are in an ascending scale of importance, in proportion to the solemnity of the undertaking. Out of this difference many important distinctions arise, of which the most material are the following: 1. That whereas in every simple contract, with one exception, the consideration must be proved, in a deed or record, it is incontrovertibly presumed: 2. That a deed is binding on the heirs of the contractor if named, and a record on his lands; whereas a *parol* contract extends only to the personal property of the contractor, and binds only himself and his personal representatives.

It was said, that the law gives the liberty of forming engagements to all who have *the power of choice*. Freedom of choice, however, is essential to the validity of every engagement, and indeed is implied in the very notion of an agreement. Now choice is a combined exertion of the understanding and the will. It follows, therefore, that where there is in either party an *incapacity* to understand or to will, there can be no contract. Hence by the law of England all, who from their birth have been destitute of reason, and all, in whom subsequent disease, or other causes, have produced either permanent or occasional derangement, are declared incapable of contracting. It has been customary to distinguish the two classes by the names of *idiots* and *lunatics*. And though the latter name belongs in strictness to those only who are visited by periodical and intermittent fits of insanity, it may still for convenience be retained, if its legal definition be sufficiently extended. Let it be understood, then, to embrace all cases of adventitious insanity, however induced, or however varied in its symptoms. For instance, a man may by continual drunkenness destroy his intellectual energies, and become incapable of judgment. Yet such a one, however culpable the origin of his malady, is still within the protection of the law, as a man of unsound mind, so that the engagements made by him during his continuance in that state are altogether void. There is one obvious distinction between the engagements of an idiot, and those of a lunatic, viz. that the former are always and from the first absolutely null; whereas those of the lunatic

are avoided only upon an inquisition finding the fact of lunacy—inclusively, however, and by relation to the time from which the incapacity of mind is found to have commenced.<sup>1</sup> Not that a lunatic, even before the inquisition, can be compelled to perform an engagement stipulated during a period of insanity. Neither law nor common sense allow, that, where one of the essential ingredients is wanting, the binding consequences of a contract should attach; and mental incapacity

<sup>1</sup> The proposition is here broadly laid down, that the contracts of a lunatic are without exception, absolutely void, from the period at which the inquisition finds the lunacy to have commenced; and the authorities in support of it, if authority were wanted in a matter so obvious, are, 1 Ch. Ca. 113. 2 Atk. 412. 2 Strange, 1104. 3 Camp. 126. A recent case may seem at first sight to be somewhat at variance; we apprehend, however, that a careful consideration of the principle of that case will show, that it forms no exception to the general rule. We allude to *Baxter v. The Earl of Portsmouth*, 5 Barnew. & Cress. 170. and more fully reported in *Chitty, jun. on simple contracts*, p. 256. The form of action was *indeb. assump.* The defendant during the period between 1818 and 1823, had hired carriages of the plaintiff, suitable, as was proved, to his rank, and had thereby incurred the bill which was the subject of the action. For the defence an inquisition was put in, finding the defendant a lunatic from the 1st Jan. 1809 continually to the date, which was subsequent to the time of incurring the bill. The Ch. J. (Abbott) at the trial thought that the plaintiff was not barred of his action by this plea, the benefit having been actually received, and no fraud practised by him; and the Court of King's Bench subsequently confirmed this opinion. Now the result it is impossible to quarrel with: it was what reason and equity pointed to; still it may be doubtful, whether the court did not rather usurp the jurisdiction of an equitable tribunal; and at all events the reasoning by which it arrived at its conclusion, appears to have been very questionable. The learned judges who gave their opinion, drew a distinction which, for the purpose to which it was applied in the argument, was irrelevant to the question; viz. whether the transaction were a fair one on the part of the tradesman or not. Now the principle of the rule as to the contracts of lunatics is not a presumption of fraud, but a deficiency in that which is essential to a contract, viz. assent of the understanding; and the rule itself is, not that the contract may be rendered void, but that it never was a contract at all. Their reasoning, therefore, ought rather, as it seems to us, to have been this: "The plaintiff proved the letting of his carriages, and that the defendant made use of them. The presumption of law then applies, that the defendant undertook to pay for them what they were reasonably worth. The defendant, however, (or those who represent him,) proposes to set up a defence, which, *if admissible*, would overcome the presumption. But this would be against good faith and honesty, and he is therefore precluded, or *estopped*, from setting it up. To be sure, if fraud had been practised upon him, (for it is in this view that that question becomes material) we would have admitted it: but here there is no pretence of fraud." It cannot be objected to this mode of reasoning, that the contract here was an *express* contract; because the plaintiff declared in *indeb. assump.* and relied, therefore, on the implied promise in law. See an analogous case mentioned hereafter, where a husband is held liable for necessaries furnished to his wife after express notice.

at the time of contracting is admitted therefore as a good defence, not only in equity, but at law. Our law was indeed once disgraced by the recognition of a contrary doctrine, supported by a contemptible refinement of absurdity, which declared that a man could not be allowed to stultify himself.<sup>1</sup> But at this day no stipulation, however testified, whether by parol, by deed, or by record, entered into by one, who at the time was destitute of understanding, will prevail on a court of equity; and even at common law, nothing but the transcendent authority of a record, which admits of no question, is exempt from impeachment on that ground.<sup>2</sup> Whether the temporary prostration of the understanding, induced by a fit of drunkenness, is such an incapacity for contracting, as will on that account defeat an engagement entered into under such circumstances, was a question formerly much controverted:<sup>3</sup> but it seems now to be settled, as good sense and consistency demand, that such an engagement, wanting the requisite assent of the understanding, is invalid both at law and equity.<sup>4</sup>

Mere weakness of understanding in the party contracting is not *of itself*, a recognized ground of incapacity to contract. Unless there be an absolute privation of the reasoning faculties, all men are considered as possessed of understanding sufficient for the conduct of their own affairs, and competent to bind themselves by agreement.<sup>5</sup> The reason undoubtedly is the difficulty of applying a different rule. It would be manifestly

<sup>1</sup> 39 H. 6. 42. Co. Litt. 247 a. 4 Co. 124. Cro. Eliz. 398. See also 2 Bl. Com. 291, 2, and the notes by Mr. Fonblanque *d, e*, to the Treatise of Equity, b. 1. c. 2. s. 1. "It is always," says the learned translator of Pothier on Obligations, "a question of fact, whether a given act is imputable to a given individual; and where the nature of the act requires a mind capable of rational assent, the want of such capacity is a negation of the act imputed." Appendix, No. 3.

<sup>2</sup> Hobart, 224. Co. Litt. 247.

<sup>3</sup> Ch. Ca. 107. Co. Litt. 247 a. Heineccius, c. 14. s. 392. As to the relief afforded by equity in such cases, see 1 Ch. Ca. 202. 3 P. Wms. 130. and the opinion of Lord Hardwicke in *Cory v. Cory*, 1 Ves. 19. See also 1 Ves. & B. 30.

<sup>4</sup> 18 Ves. 15, 16. Bull. N. P. 172, citing the opinion of Holt, Ch. J. 3 Camp. 33. and 1 Stark. N. P. C. 126. per Lord Ellenborough. And see Pothier, Pt. 1. c. 1. s. 1. art. 4. div. 49. The law of Holland agrees with this.—See Institutes of Holland, p. 1. 90.

<sup>5</sup> Still the weakness of capacity may be a material circumstance for inferring unfair practice, when the bargain is manifestly to the disadvantage of the weaker party; and fraud, as we shall hereafter see, vitiates every thing into which it enters.

impossible for the law to ascertain in every case, by a nicely graduated scale, minute differences of intellectual capacity.

Accordingly, where this difficulty does not exist, it resumes its office of protecting the weak against the practices of the strong. Now those who have not yet attained to manhood (a period which by our law is, for this purpose, fixed at 21 years), cannot in general have had experience sufficient to guide them in the management of their own affairs; and this incompetency being so far uniform, that it can be reduced to a tolerably accurate standard, the law interposes to shield them against the impositions to which the indiscretion of youth is liable; and does not bind them to the performance of their engagements.<sup>1</sup> But the reason which gives this indulgence to the *infant* (for so a person under the age of 21 is, with some inaccuracy of language, denominated by our law) manifestly does not apply to the other contracting party, if he be of full age. He at least is capable of providing for his own interests; and his engagement, therefore, if the infant choose to insist on performance, is obligatory on him.<sup>2</sup> Upon the same principle, if the infant himself, after his attainment to full age, recognize the engagement by an express and deliberate undertaking, he will thenceforth be bound by it.<sup>3</sup> It is in fact a new engagement, rather than a confirmation of the former one, founded, it is true, on a benefit received before, but made at a time when he must be supposed capable of estimating what that benefit was worth, and when he had the choice of adopting it, or not.<sup>4</sup> A reasonable distinction, however, has been drawn between such transactions as are apparently for the infant's benefit, and such, as are clearly to his prejudice. The latter are held to be altogether *void*; the former merely *voidable* at his election.<sup>5</sup> Thus, the lease of a house, or the letting out to hire of a ship, may be confirmed by him when of age, without a renewal of the instrument. Indeed, if the

<sup>1</sup> Bac. Abr. Infancy, 1. Com. Dig. Infant, B.

<sup>2</sup> Bac. Abr. Infancy, 1. 4. Strange, 937. 2 M. & S. 205.

<sup>3</sup> Co. Litt. 3 a. 2 Vent. 203. 1 Mod. 25. Strange, 690. 9 Vin. Abr. 393, 394. 1 T. R. 648. 2 T. R. 766.

<sup>4</sup> See the observations of Lord Ellenborough in *Cohen v. Armstrong*, 1 M. & S. 724.

<sup>5</sup> See the case of *Zouch v. Parsons*, 3 Burr, 1794. where this distinction was much discussed by Lord Mansfield.

contract be such, that after his maturity it is still in a course of performance (as if a partnership, entered into by him when under age, be continued after his majority), the engagement will thenceforth bind him, unless he at that time expressly repudiate it. But where the contract is *void*, as in the case of a bond with a penalty, no acknowledgment after full age can set up and give validity to the transaction.<sup>1</sup>

The rule of law proceeds, as we have said, on the principle of protecting the young against the practices of such as might be inclined to take advantage of their inexperience: when therefore the circumstances of the transaction repel the presumption of unfairness, it is just, and for the benefit of the infant himself, that the rule should not apply. Accordingly a person under age may enter into a binding engagement to pay a reasonable price for such things as are necessary to his comfort, and proper to the station he holds in society. It is usual to include all such things under the general term of *necessaries*, and the expression, if understood as relative to the degree and condition of the infant, is sufficiently accurate for all practical purposes.<sup>2</sup> The law will not countenance the claims of those who indulge, or take advantage of the extravagance of minors, but holds it to be the duty of the tradesman to make such previous enquiries as may satisfy him that the goods supplied are what may reasonably be required. If therefore the infant were already provided with all that was necessary, either by his father or from other tradesmen, he cannot support his claim.<sup>3</sup> An infant cannot be sued for money lent in a court of common law; not even when advanced for the purpose of being expended in necessaries, because when trusted to the infant himself, it may be misapplied.<sup>4</sup> A court of equity, however, will grant relief, where the money has been lent to pay a debt for necessaries, and has been applied accordingly, by allowing the lender to stand

<sup>1</sup> 8 Taunt. 35. 5 B. & A. 147.

<sup>2</sup> Co. Litt. 172 a. 2 T. R. 159. 4 T. R. 363. 8 T. R. 578. Peake's N. P. C. 229. 4 Campb. 164. Necessaries for the wife of an infant are considered as necessaries for himself. 1 Strange, 168. It may sometimes be a question, whether the credit was not given to the father: if it were, the infant is of course exempt. See Baker v. Keen, 2 Stark. N. P. C. 501. Alleyne, 94.

<sup>3</sup> 2 Stark. 501.

<sup>4</sup> 1 Salk. 297. 387. 1 Vern. 255.

in the situation of the creditor for necessities, whom he has satisfied.<sup>1</sup>

As the law considers a minor wanting in the necessary discretion to contract, *à fortiori* it does not recognize him as a trader.<sup>2</sup> It does not, therefore, hold him liable on the custom of the realm, as a carrier or innkeeper,<sup>3</sup> or on the law of merchants, as on a bill of exchange, or promissory note, when given in the course of trade, and as a negotiable instrument;<sup>4</sup> nay, it is very doubtful whether either would be available against the infant, even though given for necessities, and in the hands of the original payee.<sup>5</sup> It will not bind him by the statement of an account,<sup>6</sup> nor regard him as a partner,<sup>7</sup> nor suffer him to be made a bankrupt.<sup>8</sup> But though not liable on a mercantile contract, he is not precluded from suing upon it,<sup>9</sup> and, had not the case been questioned, it would seem unnecessary to add that a negotiable security is not invalidated, because it has passed through the hands of an infant.<sup>10</sup>

By the civil law, persons who squandered away their money in extravagance and dissipation might, on the application of those who were immediately interested, be placed under what was called an interdiction for prodigality. From this time they were incapable of entering into valid contracts. The law of England has nothing analogous to this; except that the courts of equity view with great jealousy contracts entered into with young persons, engaged in a course of dissipation. This, however, is not on the ground of an incapacity.

<sup>1</sup> 1 P. Wms. 559.

<sup>2</sup> Therefore an action against an infant for goods supplied to, or work done for, him, for the purposes of a trade, by which he gains his livelihood, cannot be maintained. Cro. Jac. 494. Strange, 1083. 2 M. & S. 209. 6 Taunt. 120. 8 Taunt. 35. 5 B. & A. 147. 2 B. & C. 824.

<sup>3</sup> Carthew, 161.

<sup>4</sup> Carthew, 160. Holt's N. P. C. 359. Com. Dig. Infant, C. 2.

<sup>5</sup> 1 Camp. 552. Bayley on Bills, 19. Chitty on Bills, 16. Holt's N. P. C. 78.

<sup>6</sup> 1 T. R. 40. 2 Stark. N. P. C. 36.

<sup>7</sup> 1 Stark. N. P. C. 26. 5 B. & A. 147.

<sup>8</sup> Cullen, 26. A debt contracted during infancy is not sufficient to support a commission against a trader, on an act of bankruptcy committed after full age. Bull. N. P. 38. 1 Atk. 146. 197. 4 Ves. J. 163. 11 Ves. 402. 1 Ves. & B. 494. 6 Taunt. 119. 2 M. & S. 207.

<sup>9</sup> 2 M. & S. 205. 6 Taunt. 118.

<sup>10</sup> 4 Esp. N. P. C. 131.

city in them to contract, but of an undue advantage taken of their weakness and indiscretion.

But we have said that in order to constitute an agreement, there must not only be an assent of the understanding, but an exercise of the will. We need hardly say, therefore, that where there is no recognized will, there can be no contract. Now, the law of England, somewhat ungallantly perhaps, but in truth by a wise and commendable policy, considers the moral existence of the woman as incorporated, or rather merged, by marriage, in that of the man. It looks upon the will of the wife, not as identified with, but altogether lost and absorbed in that of the husband.<sup>1</sup> The consequence is manifest: the engagements of the wife, made during marriage, or as the law aptly enough expresses it, *coverture*, are altogether ineffectual; the general rule being, that neither she, nor her husband, can sue or be sued on any stipulation entered into by or with her, whilst this incapacity continues. All such engagements, whether evinced by simple contracts or by deed, are absolutely void.<sup>2</sup> There are of course qualifications of this, as of every other rule. Laws which are for the benefit, are not to be strained to the disadvantage, of the community. Whenever the strict application of a rule would work general and manifest injustice, the same reason which first established it, equally sanctions the relaxation of it. Hence, the contracts entered into by the wife for necessaries (i. e. for goods corresponding to the rank and appearance which the husband permits her to assume in

<sup>1</sup> Our law uniformly manifests the most anxious disposition to preserve entire the union of the married state, and to prevent whatever might be likely to introduce domestic discord. Undoubtedly, by this surrender of the wife's legal existence, it has taken a very effectual step towards the attainment of its object. It seems to have proceeded on that Homeric maxim, which we sincerely believe, so far as the executive of government, whether domestic or political, is concerned, will be found universally true—

“ οκ αγαδον πολυκοιρανια· εις κοιρανος ετω.”

<sup>2</sup> Com. Dig. Baron & Feme. Bacon's Abr. Baron & Feme. 1 Sid. 120. 1 Lev. 4. 2 Atk. 453. 6 T. R. 609. 11 East, 301. 4 Campb. 26. If, therefore, the wife sell or dispose of the goods of the husband without his assent, he may recover them back from the holder, and if she lose money at cards, he may bring an action for it against the winner. Com. Dig. Baron & Feme, 2.

society) are, not only out of a due regard to the interests of the wife, and the rights of the fair-dealing tradesman, but even for the sake of the personal convenience of the husband, held to be binding on the latter.<sup>1</sup> Still the law does not depart from its principle. It does not consider these transactions as the acts of the wife, but of the husband represented by her. And in this reasonable fiction it does but conform to a still more general rule, that whatever is done for a man's benefit shall be presumed, unless expressly repudiated, to have been done by his authority. Of course this, as well as all other presumptions, may be rebutted by fact. Thus, an express notice to the individual tradesman not to trust the wife will discharge the husband.<sup>2</sup> Nor does the presumption attach, where circumstances shew that credit was given, not to the husband, but to the wife.<sup>3</sup> The tradesman has then chosen to rely upon her honour, and he must abide by the consequences. As in the case of infants, so in this, money lent to the wife for the purchase of necessaries cannot be recovered in law<sup>4</sup>; in equity, if really so applied, it may.<sup>5</sup> And in both, an actual payment on account of necessaries for the wife may be claimed from the husband, as money expended for his use and benefit.<sup>6</sup>

But a *separation* may take place, and that under various circumstances. What effect then will this produce on the rights and obligations of both? If the marriage be annulled by a court of competent jurisdiction for some original vice of the contract or solemnization, the parties, never having been married in contemplation of law, have the same rights and liabilities as to all engagements made with third persons during the period of cohabitation, which they would have had, if they had remained single in fact. Still, it cannot be doubted that for necessaries supplied, during the period of cohabitation, to the supposed wife, the nominal husband would, on the ground of a presumed authority, be liable even

<sup>1</sup> Com. Dig. ubi ante. <sup>2</sup> Lord Raymond, 1006. <sup>1</sup> Salk. 118. <sup>1</sup> Campb. 121. It is at the peril of the tradesman if the goods supplied are beyond what is suitable to the apparent circumstances of the husband. <sup>3</sup> B. & C. 631.

<sup>2</sup> Strange 1214. A general prohibition will not. <sup>1</sup> Sid. 121. Lord Raymond, 444. Strange, 875. <sup>3</sup> 3 Camp. 21. 4 B & A. 255.

<sup>4</sup> 1 Moore, 126.

<sup>5</sup> 1 P. Wms. 483.

<sup>6</sup> Salk. 837.



after the dissolution.<sup>1</sup> A divorce on account of adultery puts an end to the marriage, and therefore to its consequences, from the period of the sentence; but a separation *à mensa et thoro* does not affect the legal relations of the parties; and the wife, therefore, though living apart from her husband, and upon her own resources, is not liable upon her contracts.<sup>2</sup> Hitherto the rule is simple; but the question as to the liability of the husband, for necessities supplied to the wife in case of separation without divorce, has something about it of more intricacy. The following distinctions seem, however, to be now settled. 1. When the separation is by *mutual consent*, if competent provision be made by the husband for the maintenance of his wife, either by deed or verbal agreement, he is not liable;<sup>3</sup> provided that in the latter case payment has been made,<sup>4</sup> or in the former, that the trustees have taken possession under the deed.<sup>5</sup> 2. Where the separation is in consequence of the *adultery of the wife*,<sup>6</sup> or, if during separation caused by other circumstances, even the fault of the husband, she *has been guilty of adultery*,<sup>7</sup> in either of these cases, he is thenceforth released from all obligation to provide her even with the bare necessities of life.<sup>8</sup> The separation, however,

<sup>1</sup> It has been decided that if a man cohabit with a woman, holding her out to the world as his wife, he is liable for goods furnished to her, even by a tradesman who knew that the parties were not married. 2 Esp. N. P. C. 637. 1 Campb. 246. 4 Campb. 215. This must have proceeded on a presumed agency of the nominal wife, and is therefore a stronger case than the one supposed.

<sup>2</sup> 6 M. & S. 73. 3 B. & C. 291. The courts of common law at one time assumed to themselves the extraordinary discretion of determining, that, where a married woman by agreement lived apart from her husband, and had a separate maintenance settled upon her by deed, her general disability was removed, and her contracts became equally obligatory with those of other persons. See the case cited 1 T. R. 5. But this doctrine, which was long doubted, was at last exploded, and the law restored to its former consistency, by the case of *Marshall v. Rutton*, 8 T. R. 545.

<sup>3</sup> Lord Raymond, 444. Salk. 116. 2 New Rep. 148. 4 Campb. 70. 4 B. & A. 252.

<sup>4</sup> 3 Campb. 370. 2 Stark. N. P. C. 86.

<sup>5</sup> 8 Taunt. 343.

<sup>6</sup> *Ham v. Towey*, cited in Selwyn's N. P. Assumpsit. <sup>7</sup> *Strange*, 647. 706.

<sup>8</sup> There is a case reported, in which, although the husband had been guilty of adultery with a woman whom he brought to his home, and had turned his wife out of doors without any imputation on her conduct, yet because the wife subsequently, during the separation, committed an act of adultery, the husband was held not liable for necessities furnished to her. *Govier v. Hancock*, 6 T. R. 603. This is most harsh and unjust.

whether by consent, or by the fault of the wife, must be notorious, else the presumption of authority from the husband remains.<sup>1</sup> 3. Where the wife has *voluntarily* quitted her husband's roof, and has not committed adultery, he may discharge his liability by a particular notice, but not by a general advertisement.<sup>2</sup> But, lastly, where the separation is occasioned by the *misconduct of the husband*, his responsibility for necessities furnished for his wife's support, so long as she preserves her own fidelity, remains under all circumstances. He cannot divest himself of it either by a general advertisement or a particular notice, for the law will permit no man to take advantage of his own wrong.<sup>3</sup> It may be collected from what has been already said, that in none of these cases can the wife herself be sued either at law or in equity; and the tradesman, therefore, who gives credit to a married woman, has need to satisfy himself previously, by careful inquiry, of the circumstances of the party, or he does so at his peril.

There are, however, some few cases in which a woman, though married, is treated as a single woman (or, as the law terms it, a *feme sole*), whose contracts are binding on herself. These are, first, where the husband is, in contemplation of law, no longer in existence, as when undergoing a judicial sentence of transportation.<sup>4</sup> 2. Where the husband is a foreigner, or alien, who has never been in this country at all;<sup>5</sup> for if he has once resided here, it seems the legal inference is, that he intends to return; and in that case the personal re-

<sup>1</sup> 1 Bos. & Pul. 226.

<sup>2</sup> 1 Sid. 109. Freeman, 348. Strange, 1214.

<sup>3</sup> This is a beautiful illustration of a rule of law, overcome by a more general rule of reason and equity. The presumption of authority, which is the only legal foundation of the husband's liability, might here be rebutted by the fact: but the law will not listen to the husband, when he would turn his own misconduct to his gain, and estops him, therefore, from setting up such a defence. There has been some difference of opinion whether the introduction of a mistress into the house where his wife is residing, is such misconduct on the part of the husband, as justifies the wife in quitting his roof: and, consequently, whether he is liable for necessities supplied to her whilst so living apart. In *Hopwood v. Heffer*, 3 Taunt. 421. the Court of Common Pleas decided in favour of the husband; but Lord Ellenborough is stated to have held in a subsequent case, that of *Aldis v. Chapman*, cited in Selwyn's N. P. 281. that he was bound under such circumstances to supply her reasonable wants; and there can, we think, be little doubt on which side justice, humanity, and good sense incline.

<sup>4</sup> Co. Lit. 133 a. 2 Bos. & Pul. 231. 11 East, 303.

<sup>5</sup> 3 Campb. 124.

sponsibility of the wife does not attach.<sup>1</sup> 3. Where he has been absent and not heard of for a period of seven years; the law in such case presuming that he is dead. It need scarcely be added, that a married woman is not recognized as a *trader*. Yet, in the city of London, she may, by peculiar custom, carry on a trade separately and on her own account: and, if the husband do not interfere in it, she may, as to all the transactions connected with that business, be treated as a single woman,<sup>2</sup> except that in the suits, which are brought against her,<sup>3</sup> in her capacity of *feme sole trader* (for so she is designated) the husband must be made a party for conformity.<sup>4</sup>

But the wife may have entered into contracts before her marriage, the effects of which remain after the marriage. And on this subject it may be sufficient briefly to remark, that the husband, by the marriage, gains the right to sue, in conjunction with his wife, on such contracts — that the fruits of them become absolutely his by possession<sup>5</sup> — but that if he omit, during the life-time of the wife, to reduce the right into possession, he cannot afterwards claim in his own right, but merely as the representative and administrator of the wife. In like manner he is liable, upon the contracts of the wife made before coverture, only whilst the marriage continues, and jointly with her. After her death, his personal responsibility upon them ceases altogether. It follows, that if the wife survives the husband, she may, in the former case, sue, and in the latter be sued, alone. There is, moreover, one instance, and but one, in which the wife may sue after the death of the husband, in her own right, upon a contract entered into during her marriage; and that is, when she is herself what is termed the *meritorious cause* of the contract; as when a service has been rendered by her personal exertion, for which a stipulated remuneration has been promised. It is of rare

<sup>1</sup> 1 Bos. & Pul. 359. 3 Esp. N.P.C. 18.

<sup>2</sup> She may, therefore, be made a bankrupt. 1 Atk. 206. 3 Burr. 1783.

<sup>3</sup> Which are confined to the courts of London. 4 T. R. 361.

<sup>4</sup> Cro. Car. 67. 10 Mod. 6. 2 Bos. & Pul. 93. 106.

<sup>5</sup> Negotiable instruments are treated in this respect as chattels, and not as choses in action. Thus, where a bill of exchange is given to a *feme sole* who afterwards marries, the right of indorsing vests in the husband, 7 T. R. 348.; and he may sue alone upon a bill payable to the wife *dum sola*. 1 Brod. & Bingh. 50.

occurrence, and might scarcely have been deemed worthy of mention, had it not been an anomaly in the law, for which there seems no sound or intelligible reason.

In concluding this subject it may not be useless to remark, that, although property may be settled in various ways, so as to be subject to the disposition of married women, yet that this is not inconsistent with a general incapacity to contract. It must be regarded rather as a modification of the particular property, drawing after it none of those consequences of personal liability, which are inseparable from the nature of a contract.

But in order to constitute an agreement, there must not only be a power of willing, but a free and *bonâ fide* exercise of the will. Reason declares that where undue constraint is put upon the inclination, the party suffering it, though he may, in order to avoid a present evil, have *assented*, cannot be considered as having *agreed*, to the terms so forced upon him. Violence offered to the will is termed in our law *duress*; and it is a gratifying instance of the advance of civilization, that in the modern reports scarcely a case can be found upon a subject which, in the ancient books, occupies so conspicuous a place. It will, therefore, be sufficient cursorily to remark, that personal violence, or unlawful imprisonment, or threats inducing a reasonable fear of the loss of life or member, or of imprisonment, whereby an engagement is extorted against the will of the party making it, constitute such duress as invalidates it altogether, and leaves it in his choice to fulfil it or not.<sup>1</sup> It is superfluous to add that the engagement of the party imposing the violence remains obligatory on him. The plea of duress is available only to the person himself who has suffered it: if, therefore, a third person enter into an engagement for the purpose of releasing another from unlawful constraint, he cannot discharge himself on the ground of duress from the obligation which he has contracted.<sup>2</sup>

<sup>1</sup> 2 Inst. 482. Rol. Abr. 687. 43 Ed. 3. 11 Hen. 4. 66. Bac. Abr. (Duress). Threats of violence, or other injury, for which an action in damages might afford a sufficient compensation, are not considered as duress. 2 Inst. 483. 2 Strange, 917.

<sup>2</sup> 1 Rol. Abr. 687. The civil law is copious on the subject of duress. It provided that the person, on whom the violence had been exercised, might, if he pleased,

There must, likewise, be a fair exercise of the understanding. Fraud, therefore, which deludes, or surprise which entraps, the judgment, are forbidden alike by natural justice and by law. Misrepresentation or concealment, *suggestio falsi*, or *suppressio veri*, are equally acts of fraud which take away the binding force of an engagement.<sup>1</sup> But the rule must by no means be taken in a large and unqualified sense. If the subject of the agreement, and the manner in which it is entered into, be such, that the person imposed upon has had a fair opportunity of exercising his judgment, the law will not supply the want of skill or caution in him, but leaves him to the consequences of his own improvidence.<sup>2</sup> The sound distinction seems to be this: if the falsehood or concealment be such that a person of ordinary experience might have detected it, then the contract stands. But if the fact alleged or concealed be peculiarly within the knowledge of the person practising the deceit, then the person deceived may withdraw from his engagement altogether.<sup>3</sup> The fraud, however, must proceed from, or at least be participated in, or adopted by, the other contracting party: else the contract stands good with respect to him, and the remedy of the injured party is by action against the person who practised the fraud. Fraud, though in many cases a good defence at law, comes more frequently, and perhaps more properly, under the cognizance of the courts of equity.<sup>4</sup> Indeed, the jurisdiction of the latter in

procure the engagement to be annulled by letters of rescission within ten years: after that time he was estopped. Our law has nothing analogous to this mode of proceeding; the violence being a good defence to any suit instituted for enforcing the engagement.

<sup>1</sup> 1 Stark. 434. 2 Bro. Ch. Ca. 420.

<sup>2</sup> *Vigilantibus non dormientibus lex inservit.* This subject will be treated more at large under the head of Contracts of Sale.

<sup>3</sup> 2 Bl. Com. 451. 3 Id. 166. *Sudg. Vend. & Purch.* 1—10. 3 B. & C. 623. See also *Gilb. Rep.* 155. and 2 Salk. 251.

<sup>4</sup> Fraud is a good defence to an action at law for non-performance of an engagement; and this, whether the engagement were testified by parol or by deed, or if the contract have been performed, an action for deceit may be maintained against the party who has practised it, and damages recovered proportioned to the injury. In equity the fraud may be assigned as a reason for not completing such contracts as are executory, or for rescinding such as are executed. See the *Treatise of Equity*, B. 1. c. 2. s. 8. n. y, and the cases there collected. In the civil law the remedy was, as in the case of duress.

this respect is somewhat more general, extending to every instance of a gross violation of good faith, and sometimes presuming fraud from circumstances, where the law requires it to be proved.<sup>1</sup> Thus equity, as was hinted before, will not allow undue advantage to be taken of the weakness or necessity of another, which, as Lord Hardwicke rightly observes,<sup>2</sup> is equally against conscience as to take advantage of his ignorance.

Neither in law nor in equity, however, is mere inequality, however great, in the terms of the contract, when unaccompanied with deceit, a ground for impeaching its validity.<sup>3</sup> By the civil law indeed, where the excess amounted to the half of the just price, the contract, if it regarded *immoveable* property, might be annulled. But even there also inequality in contracts as to *personal* property, was never admitted as a reason for vacating it; perhaps on account of the difficulty of establishing a standard of price.<sup>4</sup>

Lastly, it seems but reasonable that a *mistake* of either party, or both, as to the subject of the contract, should be a ground for annulling it. The civil law so determines, on the maxim that, where there is error, there is no consent.<sup>5</sup> Undoubtedly, however, a mistake as to the mere *qualities* of the subject, not induced by deception, will not invalidate the transaction.<sup>6</sup> And even in equity, where the matter was doubtful, or both parties were equally in ignorance, or the contract has been so long acquiesced in, that it might be inconvenient to re-open it, the transaction cannot be questioned on the plea of mistake.<sup>7</sup>

It will probably not have been forgotten, that the engagements which the law was said to enforce, were limited to

<sup>1</sup> See the remarks of Lord Hardwicke, 2 Ves. 155.

<sup>2</sup> Ubi supra.

<sup>3</sup> See the cases cited in notes *d*, *e*, & *h*, to the Treatise of Equity, ubi sup.

<sup>4</sup> Pothier, P. 1. c. 1. s. 1. art. 3. s. 4. Domat's Civil Law, B. 1. tit. 2. s. 9.

<sup>5</sup> Non videntur, qui errant, consentire. The translator of Pothier mentions a case which occurred some years ago, respecting an error of this kind. A painting was sold as an original of Poussin; but it appearing afterwards, from the opinion of several artists, to be the work of some other person, it was held that the sale was void, and the purchaser entitled to reclaim his money.

<sup>6</sup> This subject will be more fully discussed under the head of *Warranty*, in Contracts of Sale.

<sup>7</sup> See the cases cited in the Treatise of Equity, n. v. ubi sup.

such, as were neither at variance with the general interests of the community, nor unfairly detrimental to those of individuals. In analysing this limitation, we find included in the first term, all compacts which offend against public policy, or public morality, or positive law ; and in the second, all which may be deemed fraudulent, as respects the rights and interests of third parties. To such compacts the law will not lend its countenance. Now it is evident that this vice of contracts may lie either in the act of agreeing or in the thing agreed. But for practical purposes this distinction, which savours perhaps somewhat too much of metaphysical refinement may be disregarded ; and we shall therefore consider the taint as inherent in the subject-matter of the contract, and proceed to treat of it according to the division adopted above.

But as this brings us to the second main branch of our subject, it may be as well to give our readers a three months' respite from an investigation, not very captivating in its details, and unlikely, we fear, to interest any but those who can appreciate the high philosophical gratification of tracing the derivation of law through a thousand channels and ducts to every part of the social system, and of remarking that, though occasionally contaminated by the mixture of earthy substances, its waters still indicate their source from the one pure fountain of natural justice.

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#### ART. IV.—CONVEYANCING.

##### No III.

HAVING considered real property with reference to the subject-matter, we come now to estates, or "the interest which may exist in that subject-matter." In legal contemplation, the idea of an estate is inseparable from that of land ; for in England, and in most other civilized countries, an ownership of the soil exists, with very few exceptions, in some one ; and we, who fully appreciate the force of habit, can easily conceive that many, who have grown hoary in the exclusive study and unceasing practice of their profession, can no more abstract the idea of an estate from land than can a phi-

losopher that of extension from matter. This sage reflection forcibly occurred to us in meeting with the following remarks, which amusingly illustrate it. "Land (says a learned cotemporary) has existence at all times;<sup>1</sup> and the estate for which it is held has, in point of time, been subsisting therein *from the most remote period of time*, and will continue for ever: Hence the origin and deduction of titles."<sup>2</sup> That a *fee-simple* (the estate most probably meant) will, or rather may, *continue for ever* is a juridical tenet, which, as orthodox lawyers, we humbly receive;<sup>3</sup> but that it *began with time itself* is a point of doctrine, which, with all our professional faith, we cannot so easily digest. If the notion be just, it is fortunate for every class of Englishmen, except (alas !) our brethren, that the law renders it unnecessary for the owner of that estate to *prove* its existence beyond a certain period, as he must otherwise have traced his title to the first post-diluvian occupant, or (Mr. Preston, perhaps, would say) to Adam himself. We cannot, however, admit the author's inference, "hence the origin, &c. of titles;" for, if we understand the premises, it is saying, in other words, that titles have originated in their own eternal duration.

In treating of estates at this day, it is, we think, proper to premise that there are three species; at common law, by way of use, and in equity. For though these have many properties in common, they nevertheless differ in some material particulars, and many propositions in the old, which have been adopted by modern writers, are incorrect from being stated as universally true, while they apply only to the first and, now, not most important sort of estates. This remark we shall soon have occasion to exemplify; and, in order to avoid similar errors and facilitate our design of delineating the system as it stands, we shall begin with a brief explanation of what we understand by these three species of estates. The first and most ancient of them, the common law estates was the only one known to the courts of law prior to the reign of Henry the Eighth, when the equitable use was legalized by act of par-

<sup>1</sup> Hence an *upper chamber* continues for ever; for it is *land*. 1 Prest. Estates, 8. See also *supra* 271. Some judges could not comprehend how it could exist after it was destroyed. Mr. Preston has explained this.

<sup>2</sup> Prest. on Estates, 15.

<sup>3</sup> We shall touch on this point in our next.



liament. Of this estate, possession is the essence ; its rules spring from this principle, and those rules are still as important as they were formerly, the *use* not being substituted for, but engrafted on, the common law estate ; — or rather (as the old lawyers poetically phrased it) *fed* thereby as by a *fountain*. Hence, in investigating modern titles, the necessity of seeing, when the immediate ground of title is a declaration of use, that the common law estate, or *seisin*, (as conveyancers usually call it) is adequate to its intended purpose. Thus, if the use is declared in fee, while the seisin is but for life [as in a conveyance to A (simply) to the use of B and his heirs] the former is restricted to the limits of the latter.<sup>1</sup> And doubtless the sages of antiquity were delighted to perceive the laws of the material world applying to the doctrine of uses as well as to the descent of land,<sup>2</sup> when they declared, with hydrostatic truth, that the stream or use could flow no higher than the fountain or seisin it was derived from.

In the common-law estate the lineaments of the feudal system are still visible ; but any tinge of feudism discernible in uses was given them, not by legislative policy, but simply from a reasonable wish in our courts to preserve as much uniformity as was possible, or at least convenient, in the estate which the statute of uses created, and the pre-existing estate at common law. The connexion between them, we have partly seen, is extremely close ; and it will be desirable for the student to ascertain the line which divides them. By far the majority of the doctrines of our law of real property had their origin in the common law, and have been applied, sometimes with and sometimes without qualification, to the estate derived from the statute of uses. Thus, the division of estates into freehold and less than freehold, &c., the learning respecting their modification and limitation, and their devolution by the act of law, apply almost equally to such as are at common law, and such as are by way of use, or even of trust ; but in the mode

<sup>1</sup> Cro. Car. 244.

<sup>2</sup> Bracton and Coke (1 Inst. 11.) supposed, says Blackstone, the descent of inheritances to be regulated by the laws of gravitation, 2 Comm, 212. ; or, rather, simply by the law which made a weight descend. Blackstone forgets that these great lawyers flourished long before

“ God said ‘ Let Newton be,’ and all was light.”

of their creation and of their transfer, and in their capacity for settlement, uses and trusts possess peculiar qualities. For some qualities there were, necessarily resulting from the difference of their nature, and some were attributes which it was desirable to preserve at the abolition of the ancient or fiduciary use, on account of the additional capabilities they gave to real property. But it was only here, at the limit fixed by actual necessity or by sound policy, that the courts of law in forming uses, and the courts of equity in forming trusts, stopped the process of assimilation; and in surveying our whole system, the student probably will think with us, that, in its equitable part, the deviations from the plan of analogy have rather been too few than too many.<sup>1</sup>

We must now divide estates into freehold and copyhold, a classification collateral to the foregoing, and rendered necessary by the doctrines of tenure. The word "freehold," in this sense, comprises all the estates which co-exist with a free tenure, from a fee-simple to an estate at will. Blackstone, indeed, omits this division, and ranks copyholds among the lowest species of estates in free tenure (as a sort of estate at will);<sup>2</sup> but we object to this arrangement, as copyholds are altogether *sui generis*, and (whatever they might once have been) bear at present no analogy to an estate at will.

We now come to Blackstone's distribution of estates into *freehold* and *less than freehold*, which we apprehend to be correct only when coupled with and subject to the foregoing division. The word "freehold," in this sense, has no relation to tenure, and imports exclusively an estate of a certain extent and quality.

Freeholds, again, with reference to tenure, are of three kinds, "common law," "customary," and "in frankalmoin." By common law, in this sense, we mean only the *general*, as distinguished from *local and customary* law; so that a freehold

<sup>1</sup> We have been amused by the following coup-de-main in defence of trusts, by Mr. Dixon, a Chancery barrister, and author of "Observations on the proposed new Code." He there tells us, that the courts of equity trained up this child of theirs, Trusts, "in the way he should go, and it is to be hoped that now he is old, he will not depart from it."—p. 58.

<sup>2</sup> 2 Comm. 147.

created by *way of use*, may, in this view, be a freehold at common law.

To the freehold, thus understood, we shall now proceed, with an endeavour, as far as possible, to obviate the perplexity which the annexing of different meanings to the same word must cause the student. And, notwithstanding our intention to confine ourselves, in general, to modern doctrines, it will be desirable briefly to recur to the olden time, and its gloomy system of feuds and tenures. At the Conquest, and for many years after, the convulsions to which England was constantly subject, from the mingled and jarring elements of freedom and slavery, raised the shining but worthless character of the warrior, while they proportionably degraded that of the peaceable farmer;<sup>1</sup> and, when private rights were incessantly invaded and legal remedies were little more than nominal, it was, perhaps, natural that those whose employments rendered them defenceless, should be looked on with contempt;<sup>2</sup> and agricultural labours, by allowing little or no intermission, peculiarly tended to this melancholy consequence. Hence those who engaged in the debasing employment of cultivating the soil formed the lowest class of freemen; and, it is not unlikely, were often villeins.<sup>3</sup> Not such as these were *freeholders*: *they were liberi homines qui liberè tenuerunt tenementa sua per libera servitia vel per liberas consuetudines*;<sup>4</sup> their interests in the land extended to the period of a life at least; they were suitors of the courts, and judges in the capacity of jurors;<sup>5</sup> they were exclusively entitled to be summoned on juries,<sup>6</sup> to elect county members,<sup>7</sup> to defend the title of the land.<sup>8</sup> Some of these original features of a freehold remain to this day; and one of them is materially, though somewhat indirectly, influential in modern practice. For though the real actions, in which the tenant of the freehold was required to be defendant, have in practice been superseded by remedial suits

<sup>1</sup> This word is of great antiquity; it is derived from *farm* or *feorm*, an old Saxon word signifying provisions in which rents were anciently reserved. 2 Bl. Com. 318.

<sup>2</sup> Vid. 2 Eun. 102. Dalrym. 25. 1 P. Williams, 574.

<sup>3</sup> 1 Prest. Est. 204.

<sup>4</sup> Bract. lib. iv. 1 fol. 7.

<sup>5</sup> 2 Bl. Commen. 54. Sull. 58.

<sup>6</sup> 1 Inst. 156 b. Altered now. See the present qualifications of a juror, 3 Bl. Com. 362.

<sup>7</sup> 1 Bl. Com. 172.

<sup>8</sup> 4 Burr. 107.

better adapted to the state of society, yet they have never suffered a legal dissolution, and the principles they depend on form the basis of common recoveries, in which, therefore, one essential step is the making of a tenant to the præcipe, who must, with a single exception,<sup>1</sup> have the immediate freehold.<sup>2</sup> But to return ;—while the freeholder enjoyed these privileges, the termor was not allowed even a certain title in his brief interest, for it might at any time be annihilated by one of the fictitious actions we have just alluded to ;<sup>3</sup> and by a policy, founded on a preposterous desire to prevent the husbandman from rising by the arts of industry, no term could be longer than forty years.<sup>4</sup> In proportion, however, as the spirit of the feudal system gradually forsook the legislature and the courts, more rational laws were passed and sounder principles of adjudication were adopted ; and, in the reign of Henry the Eighth,<sup>5</sup> the vaunted superiority of a freehold over a term, had, in some respects, become an empty boast. Hence, for several centuries, the name of freehold has simply conveyed an idea of an estate in tenements<sup>6</sup> of indefinite duration, but which may, by possibility, continue for at least a life, and which possesses peculiar qualities, distinguishing it from chattel interests on the one hand and from copyholds on the other. But in treating of it, even with more special reference to its present nature, we were naturally led to speak of what it was, not so much from its being a venerable relic of the feudal system,<sup>7</sup> as from its having been the exclusive subject of *frank-tenure* ; and, possibly, cases may arise at this day, in which it may be necessary to inquire what hereditaments were capable of supporting this estate, for to those and those only, as we have already hinted, certain important statutes apply.<sup>8</sup>

<sup>1</sup> Where the freehold is in a lease for lives, 14 G. 2. c. 20.

<sup>2</sup> Pigot, 28.

<sup>3</sup> Co. Litt. 46.

<sup>4</sup> Co. Litt. 45. 46. But this law was soon antiquated ; see 2 Bl. Com. 142.

<sup>5</sup> 21 H. 8. c. 15. protected the termor against common recoveries.

<sup>6</sup> Post, 563.

<sup>7</sup> Mr. Preston remark, that “ even Lord Coke, contrary to the general opinion, was aware of the law of feuds and of their applicability to some portions at least of our system.” 1 Est. 201. We have no doubt that Mr. Preston's hypothesis is perfectly just.

<sup>8</sup> Supra, p. 282, et infra. 562.

Blackstone has adopted two definitions of this estate, which, at this day, convey no idea of it; viz. Britton's, that "it is the possession of the soil by a freeman," and St. Germyn's, that "the possession of the land is called, in the law of England, the frank-tenement of freehold."<sup>1</sup> But the description extracted from the principles which he lays down, viz. that "it is such an estate in land as is conveyed by livery of seisin, or, in tenements of an incorporeal nature, by what is equivalent thereto,"<sup>2</sup> gives us a more definite notion of it, and, before the change effected by uses and trusts, would have been a correct account. But there are now two conveyances derived from the statute of uses, by which a freehold in land passes without livery, bargains and sales and covenants to stand seised; as it likewise does, in the common conveyance of modern times, the lease and release, the former of which is, in general, a bargain and sale under the statute. As to trusts, the mode of creating and transferring them is too vague and indefinite, and too far removed from the nature of a legal estate, for any particular interest in them to be treated of under the same head, and to receive more than an incidental notice. Indeed, as nothing can be more remote from the feudal and genuine idea of a freehold at common law than a modern trust, under any form it is capable of receiving, the very application of the term freehold to an estate for life, or any larger estate, in an equitable ownership, is strained, and would have been absurd but for the utility of preserving as perfect a correspondence as possible in the different departments of the system. But with respect to the mode of transferring an equitable freehold, all we shall remark here is that this, like any other equitable right, may pass by a declaration<sup>3</sup> or mere contract;<sup>4</sup> for, on principles which will be explained hereafter, a contract is in equity regarded as an actual conveyance: whence, even money agreed or directed to be laid out in the purchase of land is considered in equity as land,<sup>5</sup> and

<sup>1</sup> 2 Bl. Comm. 104.

<sup>2</sup> Ibid.

<sup>3</sup> 1 Prest. Estates, 241. "Trusts," Mr. Preston truly observes, "do not give any legal estate: they merely confer an equitable interest." Ibid. 242. Perhaps his position would have been still more unexceptionable, if he had said they are an equitable interest.

<sup>4</sup> See Burton's Compendium, 425, where the authorities are carefully collated.

<sup>5</sup> Fonb. b. i. c. 6. s. 9.

may therefore possess the qualities of an equitable freehold. We shall now revert to legal estates.

Blackstone's criterion of a freehold *in lands* or corporeal hereditaments — "such an estate as is conveyed by livery of seisin"<sup>1</sup>—is, we see, incorrect from its inapplicability to uses; but his criterion of a freehold in incorporeal hereditaments is still more so—"such an estate therein as is conveyed by what is equivalent to livery of seisin." For we have shown, in the foregoing number, that the same ceremony, a deed, is required for the transfer of a chattel and of a freehold interest in incorporeal property; and, therefore, there is no peculiar form answering to livery of seisin, when the latter is the subject of the grant. We know, indeed, of no proposition universally and exclusively applicable to freeholds. One, most true, generally, is that they are "of indeterminate duration." Thus, the lowest estate of freehold, an estate *pur autre vie* (or for another's life),<sup>2</sup> and the next above it, an estate for one's own life,<sup>3</sup> are both of them, in legal consideration, indeterminate, on account of the uncertain time at which the *cestuique vie*, or the tenant, will die; and we believe there is no instance of a freehold at *common law*, either in corporeal or incorporeal hereditaments, determinate in its duration. But limitations by devise, and by way of use frequently present us with exceptions to this rule. A fee itself, created by either of these modes, may be perfectly determinate; if, for instance, lands are conveyed to the use of A and his heirs till a certain day, and then to the use of B,<sup>4</sup> A takes a fee, and, by consequence, a freehold. Hence the erroneousness of laying it down universally (as a respectable writer has done) that "if the utmost period of time to which an estate can last, is fixed and determined, it is not an estate of freehold."<sup>5</sup> There are, however, some cases under the doctrine of uses, in which an interest has been construed a chattel<sup>6</sup> by reason of its duration

<sup>1</sup> 2 Comm. 104.

<sup>2</sup> Co. Litt. 41 b. 42 a.

<sup>3</sup> Ibid. 42 a.

<sup>4</sup> 1 Prest. Abstr. 105. It is, therefore, not the essential nature of a shifting use, even when ulterior to a limitation of the inheritance, "to impair its value by uncertainty of enjoyment." Vid. sup. 267. In the case put, the *cloud* must and will fall at a given time.

<sup>5</sup> 1 Cruise Dig. 56. citing (but not warranted to this extent by) 2 Comment. 386.

<sup>6</sup> See Bac. Read. 63; but the doctrine there is at variance with a dictum of Hale, C. J. in *Pybus v. Mitford*, 1 Vent. 379.

being definite, when otherwise it would have been a freehold. There are, likewise, some cases in the doctrine of devises, in which a limitation to a devisee and his heirs has been held to confer only a chattel interest, when it has been for a certain time; as, for example, until the testator's son attained twenty-one.<sup>1</sup>

Modern practice furnishes us with an instance even at common law of the same principle. Thus, when one mortgages lands in fee, and remains in possession under the usual agreement in the deed, that he and *his heirs* shall hold till default in payment of the money on a given day, the estate which remains in him till that day is a chattel;<sup>2</sup> for, on first principles, a person cannot at common law grant an estate of freehold, and reserve, except, or take back by way of covenant an estate amounting to a freehold,<sup>3</sup> and, therefore, the nomination of the heirs is nugatory, at least at law.<sup>4</sup>

On the other hand, some *chattel interests* exist for an *uncertain* time, as estates by statute-staple, statute-merchant, and elegit.<sup>5</sup> We may mention, as another instance of this remark, that derivative interest which is allowed to be created in the devise<sup>6</sup> of a term of years, a *quasi* estate for life or *quasi* freehold, as it is usually, though less objectionably, called; as, when a long term is bequeathed to A for life with remainder over, and though the ulterior bequest is not a legal remainder,<sup>7</sup> yet as it is a right recognized by the courts of law, this case also illustrates our proposition.

Again it is true, generally, that a freehold cannot commence *in futuro*;<sup>8</sup> but this rule does not hold, even at common law, of every species of subject-matter, for it is inapplicable to incorporeal hereditaments which are created *de novo*;<sup>9</sup>

<sup>1</sup> 1 Burr. 222. 8 T. R. 41. 16 Ves. 491.

See the nature of the mortgagor's estate, well explained in Coote, Mortg. 327.

<sup>2</sup> See Touch. 79; "a man cannot grant an estate and reserve a part of the estate;" but that proposition, in which our own is involved, is too general.

<sup>3</sup> Mr. Coote (Mortg. 328.) seems to think the executor would take as a trustee for the heir.

<sup>4</sup> Coke observes that these estates have the *similitude* of a freehold. 1 Ins. 42, 43.

<sup>5</sup> Manning's Case, 8 Rep. 95.

<sup>7</sup> Ibid.

<sup>8</sup> 5 Rep. 94.

<sup>9</sup> e. g. Rents *de novo*. Plowd. 156.

and also under the doctrine of uses and devises, freeholds may have a future commencement.

Still, however, it is admitted, that legal freeholds in corporeal hereditaments require to be transferred by peculiar modes of assurance, *by livery of seisin, or that which is now tantamount thereto*; and therefore though we know of no distinctive quality, giving us a test of a freehold estate in every sort of subject-matter, the requisition we have mentioned is unquestionably characteristic of a freehold in land.

Perhaps the best general description which can be given of a freehold is, that "it is an estate of inheritance or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from, real property of free tenure, that is now of all which is not copyhold."<sup>1</sup>

We proceed to notice the other properties of this estate. Some of these are traceable to the once universal mode of conveying it when its subject-matter was corporeal, livery of seisin, and some to the disregard which terms for years, now such an important part of real property, anciently met with. Thus the rule, just noticed, that a freehold cannot commence *in futuro* was naturally drawn from the nature of livery; for as that ceremony is the actual transfer of the freehold, and consequently passed it *eo instanti* from the grantor, it evidently must vest instantaneously in the grantee, or it would be in no person, which the law will not here allow.

It is, however, observable, that when a freehold is made to have a future commencement, and in the instrument appears void on that account, but is preceded by another freehold created at a prior period, and extending to the exact time at which it is limited to commence, this rule is excluded.<sup>2</sup>

This position is easily illustrated. It applies to that class of cases in which reversioners, ignorant of their estate being a present interest, and imagining a present grant of it inaccurate, convey their reversions so as to take effect (as they think) at the determination of the particular estate. In these instances, the courts in order to support the grant, and acting on the maxim *res magis valeat quam pereat*, have held the future words in the limitation to fix the time at which the

<sup>1</sup> Christian's Blackstone, vol. ii. 104. n. (1).

<sup>2</sup> 1 Prest. Est. 225.



estate shall commence in *possession*, not that at which it shall commence in *interest*. Thus where one conveys to the use of A after the death of B, who is tenant for life under a former deed,<sup>1</sup> or whenever after B's death, the reversion shall fall;<sup>2</sup> — or when one has the reversion expectant on an estate tail, and devises after failure of issue of the donee in tail;<sup>3</sup> in these and similar cases, the reversion passes instantan.

But when the freehold estate limited by the reversioner is not to commence at the precise determination of the subsisting estates, it is not within this construction,<sup>4</sup> and *ceteris paribus* is void under the general rule of the common law.

Further; such freehold estate must, when there are several particular estates, be limited to take effect on the determination of the last of them,<sup>5</sup> in order to be supported by this reasoning. Thus if A be tenant for life, remainder to B for life, and the reversioner grants a freehold estate to commence after the death of A, the limitation is void, as much as if it were to commence after the Michaelmas day ensuing the delivery of the grant.

When, however, the particular estate is determinable by a contingent event, the freehold reversion may, it should seem, be granted to commence thereon, and (as Mr. Preston observes) “when the estate already subsisting is determinable on a contingent event, and the interest under the new conveyance is limited to *commence on that event*, this interest will be contingent, because the event is of such a nature, that it will not certainly take place.”<sup>6</sup>

Such appears to be the established doctrine. It is said, however, that a case has been determined in the Lords, in which a reversion granted after the determination of existing

<sup>1</sup> Weale v. Lower, Pollexf. 66. 1 Inst. 21. Roll. Rep. 256.

<sup>2</sup> 1 Sauud. 151. Dyer, 376 b. Cro. Eliz. 323.

<sup>3</sup> Badger v. Lloyd. 1 Ld. Raym. 523. 1 Salk. 232.

<sup>4</sup> 1 Prest. Est. 227.

<sup>5</sup> Ibid. 228.

<sup>6</sup> 1 Prest. Est. 228. citing Arton v. Hare, Foph. 97. the principle of which (says the author) governs cases of this description. We have acceded to and adopted his proposition; but we cannot allow it to be a legitimate deduction from Arton v. Hare, nor the applicability of that case to the present doctrine; for, there, both the present and expectant estates were created at once by the same deed of settlement, and if the latter had taken effect, it would have been by way of *remainder*. The proposition correctly deducible from Arton v. Hare is, we think, that which Fearn states, Cont. Rem. 5.

estates tail, was held void for remoteness.<sup>1</sup> If in this case no allusion was made to the well-founded distinctions we have noticed (and none appears from the transcript of Mr. Booth's note which Mr. Preston has favoured the profession with) we really cannot but infer that the Court had forgotten them. No reliance, we believe, has in practice been placed on this determination of the Lords, and we agree with Mr. Preston,<sup>2</sup> that, "as stated, it is not warranted by any principle of law."

We observed that if the freehold did not on passing out of the grantor, vest instantly in the grantee, it must be *in abeyance*, i. e. "in expectation, remembrance, and contemplation, of law." The doctrine of abeyance amusingly shows how a poetical imagination danced of yore in the fetters of technical jurisprudence. "The right that is in abeyance," (says lord Coke) "is said to be *in nubibus*, in the clouds; and therein hath a quality of fame whereof the poet speaketh:—

"Ingrediturque solo, et caput inter nubila condit."<sup>3</sup>

Coke, however, is careful not to confound his definition of abeyance, which is that given above, with his quaint and fanciful description. But this, we apprehend has been done by some who have recently attacked the doctrine of abeyance.

It is true, universally, that a freehold cannot be placed in abeyance by *the act of the party*;<sup>4</sup> therefore the grantee must take it (if at all) immediately on the livery. We shall hereafter see the importance of this principle in the doctrine of remainders.

But the freehold *may* be placed in abeyance by the *act of law*. Thus, when a parson<sup>5</sup> (or any other sole corporation, presentative, elective or donative<sup>6</sup>) dies, the freehold of the glebe is in abeyance until a successor is named, and then it vests in the successor. Such is the doctrine of the law; and so it is stated by Blackstone;<sup>7</sup> but some of his editors have not acquiesced in it; and we shall notice their comments, as they may be extensively read by those who are commencing their professional studies. Mr. Coleridge<sup>8</sup> observes, that

<sup>1</sup> Brain v. Deakin, cited from a MSS. opinion of Mr. Booth's. 1 Prest. Est. 229.

<sup>2</sup> Ibid.

<sup>3</sup> 1 Inst. 342. b.

<sup>4</sup> Hob. 153. 388. 1 Prest. Est. 216.

<sup>5</sup> Litt. s. 647.

<sup>6</sup> Co. Litt. 342.

<sup>7</sup> 2 Comm. 107.

<sup>8</sup> Ibid. (n. 2).

"perhaps it may not be unreasonable to admit this [case of the parson dying] to be an exception to the general rule; an estate is altogether the creature of legal reasoning, to be moulded, raised, or extinguished, accordingly; and it may be fairly argued, that as the freehold can exist in no one to *any useful legal purpose* during the vacancy of the church, it *may not exist at all*." Nor does it *really* exist; for a freehold can have no *actual* existence but in *some person*. The term abeyance implies as much; but it likewise signifies (one of those fictions which our law abounds with) that the freehold has an *ideal* existence, there being (as Blackstone, in a subsequent page, well expresses it <sup>1</sup>) a "legal potential ownership subsisting in contemplation of law, and entitling the successor, when appointed, to all the profits from the instant the vacancy occurred." Is not this "a useful legal purpose?" We do not say that the law could not have attained so simple an object without a fiction; we are neither her blind admirers nor eager champions; but it is our business in this place to show that the fiction in question does exist, and has "a useful legal purpose."

Abeyance, therefore, is a specific term, indicating a specific result with scientific precision, and which can be signified by no other word in our legal nomenclature. Mr. Coleridge forgets the poetic propensities of our ancient lawyers, in supposing that they really deemed it material to ascertain the actual locality of the freehold between the death of the incumbent and the nomination of the successor, when they said it is *in nubibus* and *in gremio legis*.<sup>2</sup>

Mr. Christian's mode<sup>3</sup> of avoiding the abeyance of the freehold in this ecclesiastical case (by placing it *instantly* in the *future* successor) would, we apprehend, have been adopted by the law, if it had but known how to ascertain the successor before nomination, or how to fix the freehold in him before he is ascertained. As neither of these points, however, is possible, we submit, with deference to that ingenious gentleman,

<sup>1</sup> 2 Comm. 259.

<sup>2</sup> "These terms of what might be called *legal geography* did not (says Mr. Coleridge) explain to any man's mind *where* the estate was in the interval." 2 Bl. 107. note (2). Not very satisfactorily we admit. But how long have *clouds and beams* been within the province of *geography*?

<sup>3</sup> Comm. 107. copied by Mr. Chitty in his edition.

that the law has been at least as rational and satisfactory as himself. We know not what induced him to set his singular opinion against a settled doctrine. Was he confounding the different natures of fact and fiction, and inferring that because the successor's title, when it accrues, relates back to the last incumbent's death, therefore it really accrues at that period, and actually exists in the interval?

In another case at common law, between the death of a tenant *pur auter vie* during the life of *cestuique vie* and the entry of an occupant, the freehold was in abeyance.<sup>1</sup> And, though the legislature has put an end to common occupancy,<sup>2</sup> the doctrine contained in this position is, perhaps, still material; for, even now, a case may occur where the actual freehold *pur auter vie* is suspended, as where it is limited to the tenant without an express extension to any special occupant, or when it is limited to the tenant, his executors and administrators,<sup>3</sup> and he (in either case) dies intestate. The freehold's being *in abeyance* (as above explained and contradistinguished from a mere temporary cesser)<sup>4</sup> until the letters are granted, should seem a sufficient ground for the administrator's right to the mesne profits, without resorting to arguments drawn from the presumable intention of the legislature. It is, however, observable that the case put cannot arise by the death intestate of the dower trustee in a modern purchase deed, when the limitation is to his personal,<sup>5</sup> instead of his real representatives; for the subject-matter being *a remainder*, and consequently *incorporeal*,<sup>6</sup> precludes the administrator from taking as a special occupant.<sup>7</sup>

<sup>1</sup> Co. Litt. 342. b.

<sup>2</sup> 29 C. 2. c. 3. 14 G. 2. c. 20.

<sup>3</sup> We shall hereafter examine the effect of expressly nominating the executors and administrators. See *Ripley v. Waterworth*, 7 Ves. J. 425. and the authorities there referred to.

<sup>4</sup> Blackstone appears to have erroneously considered the freehold as non-existent (simply) during the interval between the tenant's death and the occupant's entry; for he contrasts this case with the legal potential ownership (i. e. the *abeyance*) in the case of the parson. 2 Comm. 261.

<sup>5</sup> Mr. Watkins (*Conveyancing*, 88. 5th edit.) recommends this form; but his reason would have had no weight, if the subject-matter had been corporeal, instead of incorporeal. The usual limitation is to the heirs.

<sup>6</sup> Vide ante, 274.

<sup>7</sup> We believe the circumstance alluded to has been hitherto unnoticed: in *Watkins*, *ubi supra*, and in *Sugden, Powers*, 198. n. (1), it is evidently assumed that the trustee's estate exists in *land*. As, therefore, Mr. Sugden has concluded (and we

But to return :—although the reason of our law with respect to abeyance of the freehold, was altogether feudal and has long since ceased, the principle itself is as vital as ever. Hence the rule in the doctrine of remainders, that when “ a contingent remainder amounts to a freehold, it cannot be limited on any particular estate less than a freehold ;<sup>1</sup> for the freehold must pass out of the grantor, and vest somewhere else ; and, as the remainder is contingent, there manifestly is none in whom it can vest but the particular tenant.<sup>2</sup> The more modern doctrines of uses and devises created no exception to this rule ; for while they allowed a freehold to be limited *in futuro*, they precluded a suspension of the freehold, and indeed of the inheritance itself, by adopting the rational and equitable principle, that so much of the use or (as to devises) of the estate as the grantor<sup>3</sup> or deviser<sup>4</sup> does not dispose of, results to him or his heirs. One case, indeed, occurs to us in which the freehold should seem to be in abeyance under the doctrine of uses, unless we adopt a refinement which, though supported by judicial decisions, is rejected by the majority of modern writers. For when a future use is preceded by an *express* use in the grantor, which deprives him of the immediate freehold,<sup>5</sup> (as when A conveys to the use of himself for years, and, after his death, to the use of B in fee,) the freehold, we apprehend must be in abeyance for the life of the grantor, unless it resides during that period in the grantees to uses. But this is not the place to enter on any abstruse niceties of the doctrine of uses.

Again ; it is a rule flowing from the same principle, that an estate of freehold cannot exist at intervals only in any hereditaments *in esse*,<sup>6</sup> in which we include reversions and remain-

think correctly) that the authorities establish a distinction between corporeal and incorporeal hereditaments, with respect to the executor's or administrator's title by occupancy, his inference on the case of a dower trustee, which is the reverse of that we have drawn, is, we submit, at variance with his premises.

<sup>1</sup> 2 Bl. Comm. 171.

<sup>2</sup> Ibid.

<sup>3</sup> Co. Litt. 23 a. 3 Co. 81 b. Dyer, 166.

<sup>4</sup> Raymond, 28. 2 Sand. 280. 1 P, Williams, 505.

<sup>5</sup> 2 Lord Raymond, 854. 2 Salk. 679. 1 Vent. 352. 2 Eq. Ca. abr. 753.

<sup>6</sup> 1 Prest. Est. 218. 256. Shep. Touch. 127. 8 Rep. 17.

ders. Doddridge<sup>1</sup> indeed lays it down that "a rent or any such like thing may be granted on condition that if such a thing be not done, the rent shall cease for a time and then revive again; but in case of land it is otherwise."<sup>2</sup> But his learned editor has corrected this proposition, and the doctrine he has inserted into it is the same with that above propounded. The Touchstone, therefore, is so far wrong, that it states of incorporeal hereditaments generally what is true only of those created *de novo*.<sup>3</sup>

The rule itself ought, we think, to be regarded as specific and distinct; it belongs, indeed, to the doctrine of conditions.

Again; "a fee," says Comyn,<sup>4</sup> "ought to be fixed." On this position we will remark, first, that it seems irreconcilable with Lord Coke's division of "inheritance of lands," viz. into certain and immoveable and uncertain and moveable;<sup>5</sup> secondly, that it should have been applied to freeholds, as it certainly holds, to the extent in which the learned C. Baron meant it, of *all freeholds*, and, we apprehend, of *fees* only when they happen to be freehold, for of course it cannot embrace *annuities of inheritance*. But it equally applies to uses and common law estates. Thus a feoffment cannot be to the use of A every Monday, of B every Tuesday, &c.; for, as Walmsley J. said, "we do not find such fractions of estates in law."<sup>6</sup> This is an extreme case; and resting on such high authority, we must receive it as law; yet was it antecedently established that a freehold may vary as to the person.<sup>7</sup> Thus, there may be a partition, that A shall have from Lammas to Easter,

<sup>1</sup> Mr. Justice Doddridge was the author of the Touchstone: the evidence in his favour is irresistible; see Mr. Hilliard's and Mr. Preston's prefaces to that work. Sheppard must have been, if not the most impudent, the most artful daw that ever strutted in borrowed plumes. His address to the reader is admirably contrived to preclude suspicion of his theft. — "Having collected some *confused notes and observations* out of the laws of this realm; and being afterwards willing (for GOD knows I had no further end or aim in them) for mine own private help," &c. It is as true of law-books by obscure authors as of the authors themselves, that "*haud facile emergunt*," and it was long before the intrinsic merits of the Touchstone were discovered and appreciated. But what is the ultimate reward of this canting varlet, whose name is everlastingly dove-tailed into the work? — an immortality of contempt.

<sup>2</sup> Touch. 126, 127. Preston's Edition.

<sup>3</sup> See 1 Prest. Est. 250. 256.

<sup>4</sup> Dig. Est. (A 5).

<sup>5</sup> 1 Inst. 4. a.

<sup>6</sup> 1 Co. 87. a.

<sup>7</sup> Co. Litt. 4. a.

B from Easter to Lammas.<sup>1</sup> Lot meadows and alternate rights of presentation to churches, are of the same description.<sup>2</sup>

We shall now notice to subjects of a freehold. As to which it may be laid down that this estate may exist in all corporeal hereditaments, and in all such incorporeal hereditaments as savour of the realty.

Hence an upper chamber being, according to the better opinion,<sup>3</sup> a corporeal hereditament, it follows that a freehold may exist therein. This estate (Mr. Preston observes) does not cease by any accident which may destroy the house; to use his own words, "a grant of this sort gives the grantee and those claiming under him, a right to have the house always kept, *quoad* the chamber, *in statu quo*, in point of *erection*, as it clearly does in point of *sustentation*."<sup>4</sup>

We have already hinted that the word tenement has lost its strict feudal meaning, and no longer imports only what may be holden or be the subject of tenure;<sup>5</sup> it having, since the statute *de donis*, been made commensurate with things real, i. e. (to use Lord Coke's accurate language in reference to that statute) "all corporate inheritances which are or may be holden, *and also* all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercisable within the same, *though they lie not in tenure*."<sup>6</sup> And whatever has been held entailable under the statute *de donis*,<sup>7</sup> or grantable to uses,<sup>8</sup> or recoverable by an assize of *novel disseisin*<sup>9</sup> or *precipe quod reddat*, has capacity for a freehold interest. Mr. Pigott, indeed, endeavoured to invest an *advowson in gross* with *anomalous* properties; admitting that it is entailable, and

<sup>1</sup> Co. Litt. 4. a.

<sup>2</sup> 1 Prest. Est. 258. Vid. *ibid.* 252 to 259, where the author endeavours to reconcile the seeming opposition in the general doctrine.

<sup>3</sup> *Supra*, 271.

<sup>4</sup> 1 Estates, 214. It must be admitted, that the principle contained in this explanation is somewhat unsatisfactory, and we do not wonder at its being rejected by some reverend judges of antiquity. See Vin. Abr. Est. A. (2).

<sup>5</sup> *Supra*, 281.

<sup>6</sup> 1 Inst. 20 a.

<sup>7</sup> As to which, see Comyn, Dig. Est. B. (2).

<sup>8</sup> See Jones, 127. Gilbert Uses, 485, and n. 4. 3d edit.

<sup>9</sup> See Webb's case, 8 Co. 46. 2 Inst. 409, &c. The proposition, however, is not convertible; an assize, for instance, does not lie for an *easement*, nor for an *office without profit*. *Ibid.* 2 Inst. 412.

that the estate tail is barred by recovery ; and yet contending that the freehold is in the parson, and that consequently the recovery ought not to be suffered on a writ of entry *sur disseisin*, (i. e. *præcipe quod reddat*) but by writ of right of advowson.<sup>1</sup> But this opinion is not law ;<sup>2</sup> an advowson in gross is strictly a tenement ; and it has lately been held to pass in a will under that word.<sup>3</sup>

We should notice that Mr. Preston affirms that "every estate of inheritance is necessarily an estate of freehold ;"<sup>4</sup> but this proposition must have resulted from inadvertence, as an estate of inheritance may exist in hereditaments of a personal nature, and therefore is not confined to *tenements*, the exclusive subject matter of freeholds.

We must observe, however,<sup>5</sup> that no incorporeal hereditaments except tithes and spiritual dues,<sup>6</sup> and, we may add, the customary rents, &c. which arise from copyholds, and are appurtenant to a manor, are capable of a freehold estate, unless the stock they spring from is of freehold tenure.<sup>7</sup> But tithes and spiritual dues are a subject matter distinct and separate from the land.<sup>8</sup>

II. On *customary* freeholds we must be very brief. They are properly of three kinds, burgage, gavelkind, and ancient demesne.<sup>9</sup> To these some have (very illogically) added *free copyholds*;<sup>10</sup> in consequence of their possessing certain privileges, and having for their specific title the generic name of "customary freehold ;" but they are held by *copy of court roll*,

<sup>1</sup> Recov. 97.

<sup>2</sup> 5 Rep. 40. Popham, 22. Dormer's case. See also Bayley v. Un. of Oxford, 2 Wils. R. 161.

<sup>3</sup> Gully v. Bishop of Exeter, 4 Bingh. 290.

<sup>4</sup> 1 Est. 214.

<sup>5</sup> See 1 Blackst. Tracts, 116.

<sup>6</sup> A recovery may be suffered of all spiritual profits when issuing out of things real, and in the hands of lay persons. Dormer's case, 5 Rep. 40. Poph. 22. Hence all spiritual profits, so issuing, are capable of a freehold. See and consider 5 Co. 41. Mr. Cruise's proposition (4 Dig. 368. sec. 15. 3d edit.) is too broad.

<sup>7</sup> They form, in fact, a part of the manor. See Touchst. 92.

<sup>8</sup> Blackst. Tracts, 116. Tithes however may be copyhold. See 1 Roll. Abr. 498. rents cannot, Co. Cop. s. 42.

<sup>9</sup> See 1 Cruise Dig. 44 to 50, 3d edit.

<sup>10</sup> We observe Mr. Humphreys (Real Prop. 24. 2d Ed.) adopts this classification.



and are, *therefore*, copyholds.<sup>1</sup> Hence what has been advanced of freeholds is inapplicable to them; but, in all essential respects, as true of lands in burgage, gavelkind, and ancient demesne, as of lands in free and common socage. Blackstone, indeed, affirms ancient demesne to be "an exalted species of copyhold," and the lands held by that tenure, to be transferable by surrender.<sup>2</sup> But here he grievously errs; for lands in ancient demesne are not, like copyholds, *parcel* of the manor, but held *ut de manerio*.<sup>3</sup> They are, therefore, strictly and properly freehold, and transferable by the same assurances as lands in free and common socage; except that, by the custom of the manor, it may be necessary to enrol the conveyance in the court of the manor.

It is true, indeed, that those customary estates in the north of England, called "tenant right," are not freehold, though alienable by deed, &c.; but these have been admitted to be anomalous in their qualities, though copyhold in their essence.<sup>4</sup>

The qualities of burgage tenure, of which the most remarkable species is borough English, vary according to the customs of every borough.<sup>5</sup>

We postpone a further notice of these customary estates till we arrive at the doctrines to which their peculiarities relate.

III. Freeholds in frankalmoign are likewise comprised in our general observations; their peculiarities (with a single exception, which we shall notice in our next) having relation to tenure, not to the quality of the estate. Frankalmoign was the tenure by which the monasteries and religious houses held their lands;<sup>6</sup> and it still exists, though confined to religious corporations, and incapable of being created at this day except by the king.<sup>7</sup> Its services were altogether spiritual, and

<sup>1</sup> Blackst. Cons. on Copy. *passim*. See also 7 East, 299, *ibid.* 409. 3 Bos. & Pul. 378.

<sup>2</sup> 2 Comm. 99. We believe this error, which must have arisen from his confounding free copyholds with ancient demesne, has been hitherto unnoticed.

<sup>3</sup> Brittle v. Dale, 1 Salk. 185. Hence a plea that lands are *ut de manerio*, and yet *copyhold*, is repugnant. *Ibid.* 186. See also 3 Lev. 405. 2 Cro. 559.

<sup>4</sup> See Doe v. Huntingdon, 4 East, 271. The deed is attended with an *admittance*.

<sup>5</sup> Litt. s. 165, 6, 7.

<sup>6</sup> 1 Inst. 95. b.

<sup>7</sup> Litt. s. 140, by reason of the statute *quia emptores*.

the purity of its nature (*heu pietas! heu prisca fides!*) awakened delight and veneration in the oracle of our law. "That frankalmoigne is the highest service was confessed" (says Coke) "by the heathen poet," [who by the way had never heard of it]

— "fuit hæc sapientia quondam  
Publica privatis secernere, sacra profanis."

"And certain it is (he adds) that *nunquam res humana prosperè succedunt, ubi negliguntur divina.*"<sup>1</sup>

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ART. V. — ON THE WIFE'S SEPARATE ESTATE, AND THE ESTABLISHED RESTRICTION UPON THE ALIENATION OF IT BY ANTICIPATION.

IN the principle that "married women have no will but the will of their husbands,"<sup>2</sup> equity, it is said, follows the law,<sup>3</sup> If this proposition were to be accepted in an absolute sense, we should infer from it that in equity as at law, "the husband and wife are one person," — that "the very being or legal existence of the woman is suspended during marriage, or at least is incorporated into that of the husband," — that we are not even to "suppose her separate existence."<sup>4</sup> A glance at the elaborate system constructed by the courts of equity upon the opposite principle, suffices to show how erroneous would be such a conclusion. In those courts we find the married woman raised into a state not merely of separate existence, but of action and power; — having an independent will, a capacity to contract, a right to assert her claims even against him with whom at law she is one person. In thus conferring upon the wife the right of property with many of its incidents, equity seems to have followed not the common, but the civil law, by which "the wife might give and

<sup>1</sup> Co. Litt. 95 b. Lord Coke's axiom, we fear, has lost its force. In the propositions of the modern reformers for destroying tenures, we find no exception of frankalmoign.

<sup>2</sup> Co. Litt. 112. a.

<sup>3</sup> Treat. Equity, b. i. c. ii. s. 6.

<sup>4</sup> 1 Blac. Com. 442.

buy without the consent of her husband, who was not affected by her contracts or debts, or injuries, nor the wife by the debts, or act of the husband."<sup>1</sup> Is it not then (it may be asked) inconsistent in the courts of equity to observe an analogy to a system so opposed to the principle of law which they profess to follow? Upon a little consideration it will appear that there is in truth no inconsistency in this, but the reverse. It is a well known principle of equity (one indeed upon which the utility of its jurisdiction mainly rests) to act upon the rules of law while having in view only the objects of the law; but as occasion requires, to adopt such other means as are suited to the nature of its jurisdiction, in order to effectuate objects for which the law has not provided. Whether therefore equity has, in this instance, interfered with the law, will be best seen by comparing the reasons of the law, with the effect of the decisions in equity. "The reasons (observes a late writer<sup>2</sup>) upon which the law virtually suspends the existence of the woman during the coverture appear to be these: — first, for her husband's safety in depriving her of the power to injure him by any act without his concurrence, or his assent, either expressed or implied; and, secondly, for her own security in guarding against the husband's influence over her, by disabling her from disposing of her own property, except by those methods and with the solemnities which the law itself prescribes." Thus the object of the law simply is to *afford protection* to the husband against the acts of the wife — to the wife against the influence of the husband. The effect of the provisions of equity has been, to confer upon *the wife* a much greater degree of *power and freedom* than she enjoyed at law. Now, if on turning to the courts of equity, we should find that the husband has there been made responsible for his wife's engagements to a degree unknown to the law; or that no provisions have there, as at law, been made for protecting the wife in the enjoyment of her property against the abuse of the husband's influence; we might indeed conclude with regret that equity has not followed the law. But it is not so. Equity has indeed given the wife capacity to enter into contracts and obligations; but so only as to bind her separate estate. It

<sup>1</sup> Cod. 8. 56. 6.<sup>2</sup> 1 Roper's Husb. & Wife, 1.

allows her to take an interest which the law does not recognize in personalty and in the profits of realty; but at the same time it allows the hand which gives it to her, to place a restriction upon the improvident disposition of it. To trace with particularity the steps by which the courts of equity have advanced to this point, would carry us far beyond the limits which we have prescribed to ourselves in this article. Being now, however, put in possession of a complete series of decisions on this important subject, we deem the present to be a proper time to state *what restrictions* on the alienation of the wife's separate estate *have been supported, and to what extent* they have been allowed to operate.

When it was established that the wife should, as to personal estate and the profits of realty settled to her separate use, be regarded as a *feme sole*, it seemed to follow that she should have as a necessary incident a power of disposition over such property.<sup>1</sup> So strictly for a long time was this consequence acted upon, that the strongest expressions of desire on the part of the settlor, that *the wife* should have the continued enjoyment of the property settled, were not allowed to restrain her from parting with or incumbering it. Thus, a direction to trustees to pay rents and profits or dividends "to *such persons* as the wife should *from time to time* appoint, and in default of appointment *into her proper hands for her separate use*," was held to be unavailing to prevent a sweeping appointment of, or charge upon all future proceeds of the estate.<sup>2</sup> A power to dispose *by will* of the principal fund settled to the wife's separate use, was held not to restrain her from disposing of it at any time, or in any mode.<sup>3</sup> The doctrine continued to be acted upon in its fullest extent, though it soon became apparent that the practical effect of it was to give the property to the husband and his creditors.<sup>4</sup> "It was attempted (Lord Eldon has said)<sup>5</sup> in cases like *Pybus v. Smith* to be establish-

<sup>1</sup> *Fettiplace v. Gorges*, 1 Ves. Jun. 46. *Rich v. Cockle*, 9 Ves. 369. *Hulme v. Tenant*, 1 Bro. C. C. 16.

<sup>2</sup> *Pybus v. Smith*, 1 Ves. J. 189. *Clarke v. Pistor*, 3 Bro. C. C. 568. *Witta v. Dawkins*, 12 Ves. 501. *Brown v. Like*, 14 Ves. 302.

<sup>3</sup> *Heatley v. Thomas*, 15 Ves. 697; and see *Hales v. Margetum*, 3 Ves. 299.

<sup>4</sup> *Grigby v. Cox*, 1 Ves. Sen. 518. *Pybus v. Smith*, 1 Ves. Jun. 189.

<sup>5</sup> 2 Mer. 487.

ed that the alienation must be *eo modo* with the power given ; that the circumstance of a direction to pay the interest from time to time into the proper hands of a married woman, was enough to prevent her from having any absolute disposing power over the property, or any part, before the time of her own proper receipt of it. But this attempt also was overruled." In a later case,<sup>1</sup> where the trust was to permit the testator's niece to take the interest and dividends of a trust fund, or so much thereof as should from time to time be vested in the trustees during her natural life, "*for her own sole and separate use and benefit, and that her receipt alone should from time to time be a good and sufficient discharge,*" the question whether she could make an absolute disposition of the fund was given up without dispute. In a very recent case<sup>2</sup> it was declared by Sir John Leach, V.C. that "it is now too late to contend that a lady is restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands and upon her receipt alone. The contrary is settled by repeated authorities." "The principle (observed Lord Eldon in another case<sup>3</sup>) is, that all these words are only an unfolding of all that is implied in a gift *to the separate use.*"

The history of the introduction of an *express clause against anticipation* is thus given by Lord Eldon in several cases. "Lord Thurlow made that decision in *Pybus v. Smith* with great reluctance ; thinking the act proposed most unrighteous. But he looked back into the authorities."<sup>4</sup> "He still continued to struggle hard that the wife might be brought into a situation consistent with the intention of the settlor ; but he thought the decisions too strong against it. At last he began to alter his opinion, first in the case of *Miss Watson.*"<sup>5</sup> This important allusion is thus elsewhere explained by Lord Eldon. "The words '*and not by anticipation*' were inserted in *Miss Watson's* settlement, in which Lord Thurlow was a trustee, and took great pains to defeat what he took to be established by the authority of this court."<sup>6</sup> "He reasoned thus : — A

<sup>1</sup> *Brown v. Like*, 14 Ves. 302.

<sup>2</sup> *Parke v. White*, 11 Ves. 222.

<sup>3</sup> 11 Ves. 221.

<sup>4</sup> *Acton v. White*, 1 Sim. & Stu. 432.

<sup>5</sup> *Ibid.*

<sup>6</sup> 2 Mer. 487.

*feme covert, having power to alien, is a mere creature of equity to the extent to which the settlement constitutes her a feme sole, and no farther*; and he therefore thought that the court might modify the power of alienation by such a clause as that now under consideration. Lord Alvanley, who followed, thought it a valid clause,<sup>1</sup> and so it has been considered ever since. It is too late now to contend against the validity of a clause in restraint of anticipation."<sup>2</sup> It is to be inferred from one part of this statement, that Lord Eldon considers Lord Thurlow to have been of opinion at the time of *Pybus and Smith*, that no restriction against alienation of the separate estate could be supported. With profound deference we conceive that not to have been the case. We are told by Lord Alvanley in *Sockett v. Wray*,<sup>3</sup> that "in *Pybus v. Smith*, Lord Thurlow laid it down that if it was the intention of a parent to give a provision to a child in such a way that she could not alienate it, *he might do so*, but he thought the intention must be *in express terms*." The words attributed to Lord Thurlow in the report of *Pybus v. Smith*, certainly bear that construction, and expressly point out (a fact which does not appear to have been hitherto noticed) that specific form of restriction which his lordship afterwards introduced into practice. "The rule is, that *she is sole so far as she has a power of appointment*, but with any limitations described in the deed giving her that power. If the trust is to *pay the rents and profits to her upon any instrument signed by her since the last pay-day*, an instrument signed before would not do."<sup>4</sup>

It is observed by Mr. Sugden, in his admirable work on Powers,<sup>5</sup> that "it may be thought that giving full effect to Lord Thurlow's doctrine, the power of alienation cannot be suspended beyond the coverture of the object of the provision." The point here suggested has been decided.<sup>6</sup>

<sup>1</sup> *Sockett v. Wray*, 4 Bro. C. C. 483.

<sup>2</sup> 2 Mer. 487.

<sup>3</sup> 4 Bro. C. C. 486.

<sup>4</sup> *Pybus v. Smith*, 1 Ves. J. 193.

<sup>5</sup> Pa. 114. 4th ed. 1826.

<sup>6</sup> It should be noticed as one instance of the many ill effects of our present system of reporting, that this point had been decided (in 1822,) several years before the publication of the last edition of the work in which it is proposed for consideration; and that the case in which it was decided has but very lately been published, that is, more than six years after the decision.

In *Barton v. Briscoe*,<sup>1</sup> the question as stated by Sir Thomas Plumer, was, "whether a clause against anticipation, which is considered an obligatory and valid mode of preventing a married woman from depriving herself of the benefit of property settled, (for it is too late to argue that now) becomes of no effect by the coverture being determined, and the parties interested consenting to a transfer?" His honour decided that *the restraint on anticipation ceases on the death of the husband*.

It is satisfactory thus at length to find that the law on so important a subject as that we have here touched upon is settled. It will be additionally so to be assured that the law has been rightly settled. We shall therefore presume to notice a doubt thrown out by Sir Thomas Plumer on this point, a doubt also expressed by Mr. Sugden<sup>2</sup> in nearly the same terms. "That restraints may be imposed on the alienation of separate property, is now settled, *more upon authority than principle*. If a *feme covert* is permitted to hold separate property in the same manner as if she were a *feme sole*, it would seem that it ought in equity to have those incidents which all other property has." These observations seem to imply that the power of disposition of property which is now enjoyed in this country, by all persons *sui juris*, is an abstract right necessarily inherent in, or co-existing with the right of property. If this be so, certainly the power conferring the right of property in any given case, cannot impose or admit of any restriction upon the freedom of alienation, without a violation of principle. It is obvious that in this view of the matter the *expediency* of admitting the restriction in such case, would not affect the question. It is accordingly laid out of sight entirely both by Sir Thomas Plumer and Mr. Sugden.

Allowing this to be a question of "principle," let us for a moment consider what is the origin and the history of this "necessary incident" of property, which has been so much insisted upon. We shall then be the better enabled to estimate the difference in this case between "authority" and "principle." Sir Thomas Plumer treats the introduction of

<sup>1</sup> 1 Jacob, 603.

<sup>2</sup> Sugden on Powers, 114.

the restriction against anticipation as "*an attempt to impose upon the power of alienation a fetter unknown to the common law of England.*" We are here strongly reminded of a sensible observation of our great commentator, when speaking of the right of property: "Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, *without examining the reason or authority upon which those laws were built.*"<sup>1</sup> Now, if we will but look into "our title," we shall, it is conceived, deduce these mortifying results from the examination — that the *jus disponendi*, deriving its existence from a matter of merely civil institution (the right of property), is liable to be, and has repeatedly been, restricted and modified by the same power that created the right from which it sprung. We find that these rights do not necessarily co-exist in any degree, for that in this country, the general power of alienating land (the only property deemed worthy of the regard of the common law), was unknown till long after the right of property had been established and fortified with infinite care. The time when the power of alienation was introduced, and the slow degrees by which it was extended as the circumstances of society required, may be distinctly observed.<sup>2</sup> In conclusion, we find that our boasted freedom is of no ancient date; and though our "fetters" may be sometimes forgotten, they were not always "unknown." There were, in fact, well known to the common law of England, "numerous and intricate fetters,"<sup>3</sup> many "clogs upon alienation,"<sup>4</sup> and it may be said, even yet to bear the marks of some of them. Let us now ask, upon what "principle" has the legislative power, for the time being, acted in admitting, restraining, extending, and finally establishing, in its present extent, the power of alienation? Mr. Sugden says, "there is perhaps no sound principle upon which a restraint upon alienation can in any case be supported, where the interest is not given over, or made to cease, upon alienation." It appears, however, not to have been

<sup>1</sup> 2 Blac. Com. 1.

<sup>2</sup> See Mr. Butler's elaborate note to Co. Lit. 191. a. and see Co. 94. b.

<sup>3</sup> Ibid.

<sup>4</sup> 2 Blac. Com. 289.



without reason, that even a tenant in fee-simple was restrained from alienating his estate without the consent of the lord ; — from charging it with his debts ; — from devising it away from his heir ; — from introducing (without the consent of his tenants) a new proprietor. It was (amongst other reasons) that there might not be substituted a tenant of the fee incapable of discharging the services then required, in some shape or other, of every member of the community, — that the subtenant might know with certainty to whom to render his services — that he might not be subjected against his will to the rule of his enemy. Why those restraints were from time to time removed it is unnecessary here to point out. The reasons we have alluded to, however varying in their force with the changes of society, were all based on the ground of *public expediency*. Thus, if the restriction on alienation in any given case now be calculated to present an abuse which, in the common course of human affairs, would ensue from an unlimited power of disposition, its imposition becomes expedient. “ Authority,” in imposing the restriction in this case, and in giving unlimited freedom in others, acts in both instances upon the same “ sound principle.” It is for the power which has created the right, to prescribe the mode of its enjoyment ; thus “ this interest, which a married woman is suffered to take, is a creature of equity, and equity may modify the power of alienation.”<sup>1</sup> But, it will be said, equity *calls* her a *feme sole*. It does so, but in what sense ? “ *So far forth as the instrument creating her separate estate makes her a proprietor, so far is she a feme sole.*”<sup>2</sup> The rule of equity is, that “ a married woman cannot, by her general personal contract, bind her separate estate ;”<sup>3</sup> her general creditors have no claim upon it<sup>4</sup> — at least during her life.<sup>5</sup> Sir Thomas Plumer himself sanctioned this doctrine ;<sup>6</sup> yet what could be more inconsistent and unjust than the conduct of the courts of equity in this respect, if they regarded the wife as a *feme sole* in

<sup>1</sup> Per Lord Thurlow, quoted in *Brandon v. Robinson*, 1 Rose, 200.

<sup>2</sup> *Idem*. 1 Ves. jun. 194.

<sup>3</sup> 2 Dick. 562.

<sup>4</sup> *Duke of Bolton v. Williams*, 2 Ves. jun. 138. *Jones v. Harris*, 9 Ves. 498. *Stuart v. Lady Kirkwell*, 3 Mad. 94.

<sup>5</sup> *Anon.* 18 Ves. 258.

<sup>6</sup> *Clinton v. Willes*, MS. cited Sugd. Pow. 115. note.

that absolute sense in which that learned judge understood them to have applied the term? They have, however, in what they have done, sufficiently shewn that they have not mistaken names for realities; nor neglected, in the pursuit of technical analogies, the actual situation of a married woman.

We have, it may be urged, yet to shew, that equity has done what is expedient in supporting this restriction. If any one doubt this, he has only to consider under what "strong enforcements" must the husband (in this commercial country especially) often be, to desire the possession of his wife's separate estate. Let us call to mind the improvident husband, the "despised and ruinous man," whose creditors will no longer be delayed, to whom the usurer will lend no more; — the needy speculator, to whom suddenly some irresistible opportunity presents itself of throwing a cast which *must* enrich him: — the trader, "full of decay and falling," whose engagements are pressing upon him while his resources and his credit are rapidly wasting away. We will suppose the law to be otherwise than it is, — that the husband, in any of these cases, (and they might readily be multiplied) finds that the fund settled to his wife's separate use is, notwithstanding a restriction against alienation, at her absolute disposal. There is, he finds, still money to be had without adding to the load of debt under which he trembles — without degrading himself to ask again for what has been before refused. There is, he finds, nothing wanting to enable him to obtain possession of this property but his wife's concurrence.

"The law allows it, and the court awards it."

Is it likely, under such circumstances, that the husband will refrain from requiring a surrender of the property? — or that his wife will be willing or able to refuse to yield it to his entreaties, or his violence? Surely not. The contrary supposition is inconsistent with that upon which the main fabric of the law of coverture is built — the subservience of the will of the wife to that of the husband. The consequence must be, that the fund which, if judiciously applied, might have afforded to the husband and his family support in the hour of need, perhaps the means of retrieving their condition, will be at once unavailingly exhausted. But, let us suppose the

wife to refuse to make this sacrifice ; what then must be the consequence ? — discord, between those from whom it is the policy of the law (consulting the dearest interests of society) to remove as far as possible “ occasions of strife.” If then, we conclude, the courts of equity have had any reasons, as regards the interests of the husband, or the wife, or the children, or society at large, for permitting the settlement of property to the separate use of the wife ; for the same reasons must it be expedient to allow the adoption of efficient means for securing such property to the uses for which it was given. We have, in urging the expediency of the restriction now established, also shewn that its establishment is necessary to the consistency of the law. — If it did not exist, the separate estate would be left by law for protection against the influence of the husband, to the exercise of that will which, as against him, the law supposes to have no force : the exercise of which, in opposition to the husband, the law cannot contemplate as a means of defence for the wife’s property, without trusting in this instance to the occurrence of what it is its policy in all others to discourage or prevent.

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ART. VI. — ON THE RIGHT OF THE ORDINARY TO DISPOSE  
OF SEATS OR PEWS IN THE CHANCEL OF A PARISH CHURCH.

THE division of the kingdom into parishes is, without doubt, to be attributed to the jurisdiction of the church. It is clear that even in the apostolic age, persons were selected to watch over particular districts, and to provide in an especial manner for the spiritual edification of the inhabitants. These chief rulers or bishops again parcelled out their dioceses or parishes (*Διοίκησις, Παρoικία*, terms significant of their duty and office) amongst their presbyters, “ that it might be known of what congregation every people were, and that so they might be trained up in the school of godliness under their own pastor or minister.”<sup>1</sup> In our own history there are traces of such ecclesiastical divisions so far back as the time of Honorius

<sup>1</sup> Ridley’s View of the Civil and Ecclesiastical Law, §§.

Archbishop of Canterbury, (A. D. 622 ;) but it is plain the present metes and bounds were not then assigned, and, indeed, that they could not be the result of any single plan or of one age. For as the influence of religion was extended and population increased, districts were sub-divided, and new churches were built and invested with the rights of baptism and sepulture, the characteristics of a mother or parochial church. It is probable, however, that the limits of parishes as they now exist, were fixed before the year 1280, when we find John Peckham, then Archbishop of Canterbury, asserting the necessity of chapels of ease in large parishes.<sup>1</sup> The tithes and offerings payable in each parish were by a papal constitution<sup>2</sup> (allowed by the common law, because reasonable and just), confirmed to the parochial minister appointed by the bishop, "*pur faire divine service et enfourner le poeple et hospitalitee tenir.*"<sup>3</sup> In this view a parish has been with propriety defined, "that part of a diocese which is limited to a resident incumbent, allowed by the bishop, and maintained by the church dues in his own right."<sup>4</sup> But though bishops delegated part of their care to parochial ministers, they never surrendered to them the general superintending jurisdiction which they possess over every matter relating to the church in their respective dioceses. Though the lord of a manor might build and endow a church, it possessed none of the rights of the temple till it was consecrated by the diocesan.<sup>5</sup> Thus a law of one of our Saxon kings, after enumerating the privileges of churches, as sanctuaries, concludes "this freedom we give to every such church as shall be hallowed by the bishop."<sup>6</sup>

We have thought it not unnecessary, even for our present purpose, to premise these few very general observations, for it is important that it should be borne in mind that the bishop or

<sup>1</sup> Kennet's Par. Ant. 487. It is to be regretted that in the new edition of this excellent work, so often referred to, lately printed at the Clarendon Press, the paging of the former edition has not been preserved; and that a table of the principal matters has not been provided.

<sup>2</sup> A. D. 1200. See Degge's Parson's Couns. part. ii. c. 2. 2 Blk. Com. 12.

<sup>3</sup> 4 Hen. 4. c. 12.

<sup>4</sup> Ridley's View, 220, note.

<sup>5</sup> 3 Inst. 203.

<sup>6</sup> Ridley's View, 278, note.

ordinary<sup>1</sup> has originally paramount authority in all ecclesiastical matters arising within his diocese; and it is now our object to shew that the seats or pews in the chancel of a parish church are within this general power.

“Where there is no prescription, there the ordinary that hath the cure and charge of souls<sup>2</sup> may for avoiding of contention in the church or chapel, and the more quiet and better service of God, and placing of men according to their qualities and degrees, take order for the placing of the parishioners in the church or chapel publique, which is dedicate and consecrate to the service of God.”<sup>3</sup>

What then, is this prescription by which alone the right of an ordinary can be defeated? Prescriptive rights, though they depend upon immemorial custom or usage, it is plain, must have had a legal origin; that is, the original power of the ecclesiastical superior must have been lawfully restricted. Thus they are always said to pre-suppose a faculty or licence granted by the ordinary for the time being, by which his successors are bound. But this description of a prescriptive right assumes, so far as regards the chancel, that which we have undertaken to prove,—that the ordinary may take order for the placing of the parishioners therein.

Whether the ordinary may appropriate and dispose of seats in the chancel without the consent of the rector, has, indeed, been long a subject of controversy. In the text writers there is nothing decisive or satisfactory. Sir Edward Coke, as we have seen, states the general right of the ordinary to dispose of seats, and we cannot find either in his Institutes or his Reports, that he deemed the chancel an exception. A *dictum* adverse to the ordinary's right to dispose of chancel seats has, indeed, been attributed to him, but upon this we are disposed to place but little reliance.<sup>4</sup> Go-

<sup>1</sup> Ordinary, *Ordinarius*, is he that hath ordinary jurisdiction in causes ecclesiastical; as the bishop, or any other (deputed by him), that hath exempt and immediate jurisdiction in causes ecclesiastical. Co. Litt. 344 a.

<sup>2</sup> “The cure of a church principally concerns the souls of the parishioners, of whom the bishop hath the charge within his diocese.” Plow. 497.

<sup>3</sup> 3 Inst. 202.

<sup>4</sup> 1 Brown. and Gould. 45. It is a mere note, and on what occasion it was spoken does not appear.

dolphin<sup>1</sup> does not limit the jurisdiction of the ordinary, and states a case which is certainly not in favour of the rector's exclusive claim to the chancel.<sup>2</sup> Degge does not appear to have had any very definite idea on the subject; he says, "the seats in the chancel are properly in the dispose of the rector or parson; but it should seem that a parishioner may prescribe for a seat there."<sup>3</sup> Hughes, in his *Parson's Law*, "collected out of the whole body of the Common Law Reports," published in 1641, and which, in general, states the result of the cases correctly, says that the ordinary has power to dispose of seats in the body of the church, but does not allude to those in the chancel.<sup>4</sup> In "*The Clergyman's Law, or the complete Incumbent*," (which was *not* written by Dr. Watson, dean of Battle, but Mr. Place of York<sup>5</sup>) there is an *argument* in favour of the ordinary's right to place in the seats in the chancel, concluding, however, "yet the law as I take it, is settled to the contrary, that unless a seat be in the body of the church, the ordinary hath nothing to do with it."<sup>6</sup> And for this conclusion, the case of *Buxton v. Bate-man* alone is cited; but it is quite clear that case is no authority on this point, for the seat there was not in *the* choir or chancel, but in a choir or an aisle. The court said, "it may be that this choir belongs to the plaintiff, and has been the place where his ancestors sang requiems for their ancestors." Besides, the right of the ordinary was not in question, for it was merely an action on the case against a stranger for disturbing plaintiff in the enjoyment of the seat.<sup>7</sup> Much misapprehension has doubtless arisen on this subject from not distinguishing between *a* chancel and *the* chancel. Sheppard

<sup>1</sup> Godolphin's Abr. 444. 3rd edit. 1687. 1st, 1678.

<sup>2</sup> Sir W. Hall v. Ellis, Noy, 133.

<sup>3</sup> Degge's *Parson's Counsellor*, 444. 6th ed. 1703. 1st edit. 1672. circ.

<sup>4</sup> P. 444.

<sup>5</sup> See 1 Burr. 307. marg. note, and 2 Wils. 195.

<sup>6</sup> P. 388. 3rd ed. 1725. 1st ed. 1701. This is, generally speaking, a very useful work, but we have found some erroneous statements, which are even contradicted by the authorities cited for their support. We know not whether these errors are to be attributed to the author or to his editors, for we have not the first edition, and they have not distinguished their additions from the original text.

<sup>7</sup> See the case fully stated, 19 Vin. Abr. 297. p. 3, and marginal note.

in his abridgment,<sup>1</sup> after stating that an aisle and a pew or seats might be annexed to an ancient messuage by prescription, says, "but for all the rest of the seats the ordinary of the diocese and the churchwardens of the place are to order them." Dean Prideaux, in his excellent directions to churchwardens, says that the bishop's right is the same through the whole church, that is, in the chancel, as well as in the body of the church; only if he do not interpose, then the parson may, subject to an appeal to the bishop, dispose of the seats in the chancel in the same manner as the churchwardens do of those in the body of the church, *because of his repairing it*.<sup>2</sup> We can find no authority for this doctrine;<sup>3</sup> and as to the reason, we shall examine its validity by and by. Ayliffe, in his *Parergon*, writes, "As to the chancel, the ordinary has no authority to place any one there; for that is the rector's freehold, and so is the church: but as he repairs the one and not the other, he shall have the chancel to himself in a peculiar manner."<sup>4</sup> Nelson<sup>5</sup> states it broadly that by the Common Law the ordinary has no right to place any one in the chancel, because the rector repairs it. Bishop Gibson summarily concludes, that the seats in a chancel are under the disposition of the ordinary in like manner as those in the body of the church, there being no real ground for exempting it, since the freehold of the body of the church is as much in the parson as the freehold of the chancel.<sup>6</sup> Shaw, in his *Parish Law*, copies the opinion of Prideaux, but without acknowledgment.<sup>7</sup> Dr. Wood states without limitation, that the ordinary "originally hath the disposition of all the seats in the church and chancel."<sup>8</sup>

<sup>1</sup> P. 341. tit. Church and Churchyards. N.B. This abridgment being cited at the Rolls, 11 Nov. 1762, with some apology for the book, Sir T. Clarke, M. R. said that it was one of the best of the abridgments; but he said that the author had been thought a great plagiarist, and in particular that many parts of this abridgment were taken from the notes of Sir W. Jones. — MS. note in edition in Lincoln's Inn library.

<sup>2</sup> Pp. 74, 75. See also p. 38. published A. D. 1701. "Prideaux's work has always been held in these courts to be of considerable authority." Sir John Nicholl, 3 Phill. 85.

<sup>3</sup> See, however, 1 Barn. & A. 507.

<sup>4</sup> *Parergon*, 486.

<sup>5</sup> *Rights of the Clergy*, §§. Ibid. 139.

<sup>6</sup> Codex, 230. Burn merely cites the opinion of Bishop Gibson, and the author of the *Clergyman's Law*.

<sup>7</sup> P. 88.

<sup>8</sup> Inst. §§.

Such are the discordant and unsettled opinions of text writers, and we have searched in vain for a decision on which to rest. Some *dicta* there are both ways ; but on these we are unwilling to rely : there is one, however, so precise, and which proceeded from so respectable an authority, that we willingly quote it : — “ The general rule is, that the rector is entitled to the principal pew in the chancel ; but that the ordinary may grant permission to other persons to have pews there.” Verb. Bailey, Justice.<sup>2</sup>

In this state of the question, which we have thus opened at considerable length, for it is one of some importance, it cannot be uninteresting either to the lawyer or the ecclesiastical antiquary, that we should closely investigate the grounds upon which it is contended that the chancel is, in this respect, exempted from the jurisdiction of the ordinary.

The reasons assigned are two ;—1. That the chancel is the freehold of the rector. 2. That he is charged with the repairing of it.

1. The first reason might, perhaps, be at once dismissed with the observation, that the freehold, not only of the chancel, but of the whole church, being in the incumbent, if it proves any thing, it proves that he should have the disposition of *all* the pews, which certainly has never been contended. But further, if there be an impropriate rector and a vicar, is the freehold of the chancel in the former ? For the right is always claimed for him and not for the vicar.

Now consider the nature and origin of a church. The ground on which it stands, together with the whole fabric, is consecrated and solemnly dedicated to the service of Almighty God. The chancel was not built for the peculiar use of him who should for the time being be the owner of the great tithes, but for the convenient celebration of the rites of the church.<sup>2</sup> The land on which it stands was not vested in him as glebe of which he could make a profit ; he acquired it as he acquired the other part of the site of the church. When

<sup>1</sup> 1 Barn. & A. 506.

<sup>2</sup> “ The chancels repaired by rectors, impropriators, or appropriators, were, with the body of the church, at first erected for the use of the parishioners.” Clerg. Law, 387. “ *Vox ecclesia comprehendit ecclesiam integram, videlicet navem cum cancellis.*” Lyndw. Prid. 81.



a church was built and consecrated, it was generally endowed with land as well as tithes. The law gave the freehold and possession of the church, the fabric as well as the site, and of the property with which it was endowed, to the incumbent by induction, which is tantamount to the common law livery of seisin. An incumbent so inducted, became the parson of the church, *persona ecclesiæ*, "because he assumeth and taketh upon him the person of the church, and is said to be seised in *jure ecclesiæ*, and the law hath an excellent end therein, viz. that in his person the church might sue and defend her right, and also be sued; and when the church is full, it is said to be *plena et consulta*, of such a one parson thereof, that is, full and provided of a parson, that may *vicem seu personam ejus gerere*."<sup>1</sup> At first all incumbents were parsons, for all enjoyed the whole of the endowment of their respective churches. Nor was the practice of appropriating such property to the use of religious houses introduced at once, but by degrees, and under a pretence. The consciences of men would have revolted, had the abuse been exhibited at first in all its glaring inconsistency. Some preparation was needed before nuns and knights templars stood forth as the parson of a church! Grande nefas! as Dyer truly terms it. The beginning then was not so. At first appropriations were made only to corporations sole, being spiritual persons; as abbots, priors, deans, &c. Thus the transition was slight; for such persons might assume the cure of the souls of the parishioners, administer the sacraments, and perform divine service. The only difference was that the church acquired a perpetual incumbent; the patron renouncing for ever his right to present, the bishop his right to institute and induct, and his chance of a lapse, and the king his chance of presenting by lapse, and of the advowson escheating.<sup>2</sup> In process of time, however, religious houses, aided by the pope, whose interests they ever zealously promoted, acquired the privilege of appropriating the possessions of vacant benefices to their own use, for ever.<sup>3</sup> "And all this was done

<sup>1</sup> Co. Litt. 300. a.

<sup>2</sup> Grendon v. Bp. of Lincoln, Plow. 493. 496. 498.

<sup>3</sup> Ayliffe accuses the bishops of favouring the monks, and of being negligent of the interests of the parochial clergy as to the appropriations. Parergon, 513.

under the pretence of hospitality, which in fact was the ruin of hospitality, and especially in the parish, where it should chiefly be kept up.”<sup>1</sup> And it was discovered that there was a peculiar fitness in the union of the patronage which is a thing temporal, and of the incumbency, which is a spiritual thing. The marriage between them was deemed inviolable ; “ the one should not be divorced or separated from the other at any time.” But a corporation aggregate, however capable of receiving the things temporal, could not in its proper person perform the duties of a parson. Hence the cures were either served by some of the monastic brethren, or by a vicar (vicarius) or stipendiary curate appointed by them, who was in all respects dependent upon their pleasure. The religious houses, it is well known, did not exhibit much liberality in the provision they made for these their vicars ; Ayliffe does not scruple to attribute to this circumstance some of the peculiar practices and doctrines of the Romish Church ! “ As an affluence of wealth and other temporal goods often distracts and draws some great churchmen from the duty of their office committed to them ; so poverty renders others very unhappy in the circumstances of their lives, and obliges them either to beg, or else to use mean artifices to gain, perhaps, a bare subsistence in the world ; and, therefore, a new way was invented to support these hirelings, who were only temporal vicars [curates] at first, whilst the monasteries and greater churches swallowed the profits of the parochial benefices ; and that was by masses, prayers for the dead, and the like. As these poor vicars had no property in themselves, they entirely depended on the alms and good will of others, and on their own arts and tricks of getting money, to the great dishonour of their houses, and to the disparagement of the clergy themselves.”<sup>2</sup>

But the manifold evils resulting from the absorption of the profit of the parochial benefices by the appropriators attracted the attention of the legislature ; and it was at length provided that the vicar should be sufficiently endowed<sup>3</sup> out of the possessions of every benefice which was appropriated. This endowment consisted generally of the small tithes, being

<sup>1</sup> Plow. 497.<sup>2</sup> Ayliffe, 510.<sup>3</sup> 15 Rich. 2. c. 6. A. D. 1391.

of the least value and most troublesome to collect ; and of a small portion of the glebe. But still the vicar, though his condition was improved, could scarcely be deemed a parson of the church, *personam ejus gerere*. He was not esteemed the tenant of the freehold of the glebe of the vicarage, but the freehold was in the parson ; and the vicar himself was not such a parson against whom the lands of the vicarage could be demanded ; neither did any *præcipe* lie against him as vicar, nor could he maintain an assize in his own name.<sup>1</sup> But the inconvenience of this was soon perceived, and by a statute of Edward III.<sup>2</sup> vicars were empowered to use the same legal remedies with respect to the possessions annexed or given to their vicarage as rectors have : and their denomination in this act is peculiar ; they are called *VIKARES PARSONES*. It was, too, enacted<sup>3</sup> that in every church appropriated a secular person should be ordained vicar perpetual, canonically instituted and *inducted* into the same. Thus we find a vicar gradually acquired the same rights and estate in the glebe and tithes allotted to him that the rector had ; and that the same seisin or possession of the church which used to be given to the rector, by induction was given to him. Dr. Wood expressly says, "the freehold of the church, churchyard and glebe is in the vicar."<sup>4</sup> Now viewing the matter in this light, that the vicar, as to the celebration of divine service, (for which the site and fabric of the church was given and consecrated,) and as to his portion of the glebe and tithes, is substituted for the original rector with the same rights, how can it be contented, that the freehold of the chancel and the freehold of the body of the church are to be severed, and that the one devolves upon him, but that the other does not ? It is true that in the books it is said that the freehold of the chancel is in the parson, and that it is part of his glebe ; but it is plain that this word *parson* in a large sense includes vicar-parsons, as well as parsons impersones,

<sup>1</sup> Hughes's Parson's Law, 174.

<sup>2</sup> 14 Edw. 3. c. 17. A. D. 1340.

<sup>3</sup> 4 Hen. 4. c. 12. A. D. 1402.

<sup>4</sup> Inst. 41. See Hughes's Parson's Law. 175. "Where there is a vicar, the vicar is incumbent." Note by Serjeant Hill, 1 Burn. F. L. 76.

by which title impropriators are properly designated.<sup>1</sup> It has, too, been decided that the vicar cannot grant any licence for burying any person in or digging up the soil of the chancel without the leave of the impropriator.<sup>2</sup> But this decision may be accounted for, and, indeed, is perfectly just, on the ground that the impropriator is bound to keep the floor of the chancel in repair. But the court also declared that the freehold and inheritance of the chancel was in the impropriator. This declaration, however, seems to have been unnecessary, and besides was admitted by the vicar. Indeed, any jurisdiction which either rector or vicar may claim with respect to burying in the church, cannot with any propriety be referred to his estate in the soil. Interment within the sacred edifice was in former times deemed an honour, which few only could deserve; and the incumbent was intrusted with the power of deciding as to the pretensions of the deceased: hence the necessity for his consent and his right to interpose his veto.<sup>3</sup> The counsel who prepared the pleadings in the case alluded to above seems to have perceived the difficulty of stating that any part of a church is the freehold of a layman; he therefore describes the chancel as "*adjoining* to the church." The Bishop of London, who as ordinary, was a defendant, though he interfered not as to the right of burying, properly contended that "he had a right to see the chancel kept in repair for the celebration of divine service." Now it does sound odd to say that the service of the church is to be celebrated in a place adjoining;—yet such is the absurdity to which the proposition, that the chancel may be the property of a layman, seems inevitably to lead. In a case in which a lay impropriator forcibly entered *his* chancel by breaking through the roof, and pulled down two pews and erected others, Sir

<sup>1</sup> Wood's Inst. 31. 3 Inst. 407. Co. Litt. 300 b. Doderidge in his Complete Parson, describing a parochial church, says, "it is commonly called by the name of *Rectorie*, which is into two sorts divided, being either a parsonage or a vicarage." p. 5.

<sup>2</sup> *Coussmaker v. the Bishop of London*, 2 Wood's Tithe Causes, 359. See, too, *Gregory v. Luttrell*, *ibid.* 114.

<sup>3</sup> For the origin of burying in churches and churchyards, see Bingham, Orig. Eccl. xxiii. 4. Kennett's Par. Ant. 592. "The profit of the ground to the priests and monks, and their arts of turning graves into shrines, and receiving a present for every visit encouraged them to make thus bold with the house of God."

John Nicholl considered the chancel as a part of "the sacred edifice," and as under the protection of the ecclesiastical laws; he condemned the impropiator in costs, and admonished him to pull down the pews he had erected, and to restore the chancel to its former state.<sup>1</sup> Doubtless the loose notions which are prevalent on this subject encouraged this impropiator to proceed in so illegal a course. When the minister and churchwardens refused him admittance into the church by the usual entrance, he then thought himself justified in treating the chancel as if it had been his own barn, and unjustly withheld from him. Mr. Justice Holroyd has said that the rector has the freehold in the chancel, in the same manner as he has in the church and churchyard.<sup>2</sup> Now has it ever been contended that a vicar-parson does not acquire the freehold in the body of the church and churchyard by his induction?<sup>3</sup> The author of the *Clergyman's Law*, though he falls in with the common notion that the duty of repairing the chancel, and the freehold go together, yet he asserts the right of the vicar to the freehold of the remainder of the church. "I conceive that (although the freehold and soil of the chancel *may* be in the appropriator or impropiator, especially when they repair the same) the freehold and soil of the body of the church is in the vicar, as part of his glebe, for thereof he takes possession at his induction, by which he is seised of all the profits of his vicarage; which way of taking possession would be very strange, if the church itself was not a part of that to which he hath a right by institution, and of which he is seised by his induction."<sup>4</sup> We have anxiously endeavoured to direct attention to the circumstances under which the incumbent of a parochial church was at first held to acquire the freehold of it; "seeing he la-

<sup>1</sup> *Jarratt v. Steele*, 3 Phil. 167.

<sup>2</sup> 1 Barn. & A. 507. in *Clifford v. Wicks*.

<sup>3</sup> See *Runcorn v. Doe*. dem. Cooper (in error), 5 Barn. & C. 696. It is clear that in this case the Court of K. B. considered the freehold of the churchyard in the vicar. See Chief Baron Alexander's doubts as to the freehold of a chapel built within the parish of a vicar.—*Jones v. Ellis*, 2 Younge & J. 273.

<sup>4</sup> *Clergyman's Law*, ch. xxxix. p. 391. See Comyn's Dig. tit. "Ecclesiastical Persons" (C. 14. a.) "The interest of the vicar." See also Bellamy's case, 1 Roll. Rep. 255. as to an action by a vicar against the rector for cutting down trees in churchyard. Hughes's Parson's Law, ch. xxiii. p. 169, 170. Y. B. 4 Ed. III. 8 a.

boureth in vain, that seeketh to apprehend the knowledge of the derivative which is ignorant of the original." Without doubt he was invested with the freehold of the site and fabric of the *whole* church, not for his private gain; on the contrary, the excellent end which the law had, was, that he should possess the sacred edifice as a trust, and ever watch over and preserve it for the purpose for which it was given and consecrated, — for the performance of holy worship, for the continual edification of the parishioners. We maintain that appropriators by allowing a vicar to be inducted, and the legislature by its enactments have, in fact, declared as the reason of the thing demanded, that this trust is now vested in the vicar as fully representing in this particular, the original incumbent, and as alone capable of satisfying the original institution.

We must, however, in candour confess that we believe the general understanding of the profession to be against our conclusion, and that we are aware there are many *dicta* and some decisions (not indeed directly involving the point) which favour the opinion that the freehold of the chancel is vested in the impropiator; but we have sought in vain for some principle to satisfy us that this opinion is correct. And we remember the emphatic caution of Lord Chancellor Eldon, that though practice is strong—though general understanding, and the *dicta* of judges, and what they have taken for granted in decisions not upon the point, are of great weight, as testimony of what the law is; yet, nevertheless, the law may not be as that practice, or that understanding, or those *dicta* would *primâ facie* import it to be.<sup>1</sup>

We must now consider the second reason, which is indeed chiefly relied upon, why the appropriation of seats in the chancel is held not to be within the jurisdiction of the ordinary:—viz. because it is repaired by the rector.

It is perfectly clear that by the law of England the parishioners have always been charged with the maintenance of the body of the church, and the rector with that of the chancel. The canon law, the common law of the church, imposes the whole burden upon the incumbent; but this was never acknow-

<sup>1</sup> 1 Bligh. 455. Case of the Queensberry leases.

ledged in England.<sup>1</sup> We can trace this peculiar custom from a very early period.<sup>2</sup> Sir Simon Degge observes, "herein the common law and custom of England is kinder to the clergy than in other countries where the whole charge lies upon the rector."<sup>3</sup>

This fact being established beyond controversy, we may now enquire the reason of this distribution of the onus. The chancel could not be assigned to the care of the incumbent *because* he had the freehold therein, for he had also the freehold in the body of the church. It could not be, because the rector had any peculiar property or privilege in the chancel, for the whole church was dedicated to the service of God. The ground of the distribution was doubtless this; — the parishioners were charged in respect of their property, the rector in respect of his.<sup>4</sup> It was necessary that the sustentation of the sacred fabric should be permanently provided for; hence the law made all the lands in a parish liable. It is plain that is the principle; for if the rector or impropiator has lands in the parish not glebe, he must contribute to the repair of the body of the church in respect of such lands.<sup>5</sup> We find, too, on the endowment of some vicarages that the expence of sustaining the chancel was apportioned between the parson impersonnee and the vicar-parson. Thus Archbishop Winchelsea enjoined that the chancel should be repaired by the rectors *and* vicars; to which the learned canonist Lyndwood<sup>6</sup> subjoins, "*potes hoc intelligere, ut scilicet, ubi sunt rector et vicarius in eâdem ecclesiâ, quòd sumpsus, de*

<sup>1</sup> 2 Inst. 653. Carth. 360. 1 Salk. 164, 165. 12 Mod. 83. Dean Prideaux (on Churchwardens, 26, 27) quoting from the laws of Canute, observes, that it is plain the law was the same even then.

<sup>2</sup> See the constitutions of Cardinal Othobon, and Archbishop Winchelsea, in 1268 and 1305, and the comments of J. de Athon and Lyndwood thereon. Gibs. Codex. 198. See also "*Ordinatio Vicariæ de Chesterton*," A. D. 1403. Ken. Par. Ant. 543.

<sup>3</sup> Parson's Counsellor, 163.

<sup>4</sup> Jeffrey's case, 5 Rep. 66 b. And Walwyn v. Awberry, 2 Mod. 254.

<sup>5</sup> Serjeant Davie's case, 2 Rolle's Rep. 211.

<sup>6</sup> Lyndwood was Dean of the arches in the reign of Henry VI. "His very learned commentary on the legatine and provincial constitutions is of high authority in the Ecclesiastical Courts of this country." Per Sir John Nicholl, 3 Phill. 279. "John of Athon and Lyndwood, the ancientest and best of our English canonists." Prideaux, 53.

quibus hic loquitur, fiant communiter inter eos, *saltem secundum quantitatem beneficii unius et alterius*. Quod verum intelligas, ubi non est ordinatio certa, ad quem spectabit reparatio talis, vel ministratio hujusmodi sumptuum." Again, "Ubi plures in eadem ecclesiâ sunt beneficiati, singuli tenentur, secundum quod percipiunt de proventibus ecclesiæ, conferre ad hujusmodi reparationem." In some cases it appears that the whole burden was thrown upon the vicar.<sup>1</sup> It is true that in general the appropriators dealt out too mean a portion of the possessions of the church to the vicar to call upon him to contribute to the repairs; but the foregoing extracts shew clearly what the learned commentators thought was the true foundation of the charge. "And although one of them (parson and vicar) only repairs the chancel, and the other be exempt, yet in that either of them doth it, both are discharged all rates to the church, because the repair of the chancel equally lies upon whole tithes and glebes that are parted between them; and that one of them doth it and the other is discharged, is wholly by composition between themselves. But if no such composition appears for the laying of it on the vicar, of common right it belongs to the parson to do it, the vicar being looked on only as his stipendiary to serve the cure, and the portion which he hath of the revenues of the church no other than as his wages in order thereto. But if the glebes be out of the parish (as sometimes they are), their being glebes cannot in this case exempt them from being charged to the repair of the church in that parish where they lie. For in that parish no repairs of the chancel lie upon them, and therefore they are there on the same foot, as to this matter, with the other lands of the parish, and consequently must be charged equally with them to all the burdens of it."<sup>2</sup>

We trust we shall not be accused of presumption if we now venture to say that we cannot highly respect the scattered *dicta* in our books on this subject. Their result may be soon stated. The rector repairs the chancel because he has the freehold, and because he repairs, he has the appropriation of

<sup>1</sup> Ken. Par. Ant. 443.

<sup>2</sup> Prideaux, directions to Churchwardens, 50.—quoting Lyndwood.



the seats. We have already shewn that the freehold and the repairs have no connexion; we shall now declare the union between the repairs and the seats null and void. It would be sufficient to say, when the burden was imposed on the rector he did not and could not bargain for the use of the chancel: he took the endowment subject to the charge the law attached to it: and the law says, "*qui emolumentum percipit, debet sentire et onus.*"

But further, is it not certain that at the time the duty of repairing was imposed, that except the patron parishioners were very seldom, if ever, allowed to sit in the chancel, and therefore that the right of disposing of seats can scarcely be ascribed to that duty? Chancel in fact signifies an inclosed or separated place; and before the Reformation nearly the whole of it seems to have been required for the due performance of the offices of the church. "The hours of breviary were to be sung or said not by the vicar alone, but with the consent and assistance of all the clergymen belonging to the church. In many chancels are to be seen the ancient seats or stalls used by the vicar and his brethren in performing those religious offices."<sup>1</sup> So, in the canon law we find, "*ut laici secus altare, quando sacra mysteria celebrantur, stare vel sedere inter clericos non præsument: sed pars illa, quæ cancellis ab altari dividitur, tantum psallentibus pateat clericis. Ad orandum vero et communicandum, laicis et fœminis (sicut mos est) pateant sancta sanctorum.*"<sup>2</sup> And in the excellent glossary of Bishop Kennett, *voce* Patronus, we find a similar injunction from an episcopal constitution, "*ne laici stent vel sedeant inter clericos in cancello dum divina ibidem celebrantur;*" with an exception however in favour of the patron, "*hoc solum patronis permittitur.*"<sup>3</sup> This very constitution,

<sup>1</sup> 1 Burn, 363. who quotes Johns. 243. In the *Archæologia*, vol. xi. p. 317—396., and vol. xii. p. 101. there is a most elaborate discussion respecting the stone seats which are found on the south side of many chancels. One writer contends that they were intended for the officiating priests, while Mr. Denae maintains they were for the use of the impropiators or patron. See Noy, 133.

<sup>2</sup> Gibs. Codex. 199. See 1 Mod. 261. 2 Mod. 258. *Archæol.* vol. xi. p. 388, 389.

<sup>3</sup> See many episcopal constitutions to the same effect. *Archæol.* vol. xi. p. 389. note. *Constit. W. de Cantelupe*, Wigorn. Epi. A. 1229. *Nec laici stent in cancellis dum celebrantur divina, salva tamen reverentia patronorum et sublimium personarum.*

it may be observed, shews that the use of the chancel, when the whole was required for the due celebration of the rites of the church, was subject to the jurisdiction of the bishop :<sup>1</sup> if then the rulers of the church have so ordered the divine services that the whole is not now required, it is sufficiently obvious to whom the disposition of the part not required should appertain. The proposition that because the rector maintains the chancel, he may, therefore, dispose of the seats, may now be safely dismissed. Suffice it to say, that long before there were seats to dispose of, he was obliged to repair. And we have seen that it is too much to contend, because the law invested the incumbent with the freehold of the chancel, in order that he might protect it with the rest of the consecrated fabric, that, therefore, he may treat it as his *peculiar*, and oust the ordinary of his jurisdiction.

When the law of England decided that the property of a rector should bear a proportion of the burden of repairing a church, that part of it called the chancel, was probably assigned to him, because nearly the whole of it was required by him and his associates for the due celebration of divine service. From this use of the chancel or from the incumbent's duty to repair it, or from both these circumstances together, the notion that he has an especial interest in it probably sprung. In Dame Wyche's case,<sup>2</sup> in which a parson unsuccessfully claimed as oblations a coat-armour, pennons, and a sword deposited in a chapel where Sir Hugh Wyche was buried, Judge Yelverton said, "I have a place to sit in the chancel, and have there my carpet and livery and cushion, doit le parson aver ceux p'c'q'ils sont en la chancel? Jeo die q'non."

We may conclude these observations by noticing a case,<sup>3</sup> 7 Jac. B. R. in which it was resolved, "that of common right the parson impropriate, and consequently his tenant, ought to have the chief seat in the chancel, because he ought to repair it. *But by prescription another parishioner may have it.*"

<sup>1</sup> The ordinary may order morning and evening prayer to be said in the chancel. Johns. 245.

<sup>2</sup> 9 Ed. 4. 14 a.

<sup>3</sup> Sir W. Hall v. Ellis, Noy, 133.

## ART. VII.—THE LAW RELATING TO FENCES.

THERE are to be found lying scattered over our reports and law-treatises, various cases and observations on the subject of fences, that have not, as we believe, been hitherto collected into one view. It is our intention to bring several of these together in the present article, in order to present the country practitioner with a general outline of this, to him, important branch of the law, and point out to what sources he may most advantageously resort for more detailed information on the subject.

It must be recollected, that not only is it the duty of every man not to trespass himself upon the land of another, but he is bound to prevent his cattle also from straying there—and this equally, whether it is inclosed or not; so that, though two contiguous closes are separated by no actual fence or partition, but by that ideal invisible one existing only in the contemplation of law,<sup>1</sup> yet if cattle are suffered to escape out of either close into the other, they may be distrained, or an action of trespass will lie for such escape.<sup>2</sup> Thus, if J. S. has a piece of uninclosed land adjoining a common, and a commoner suffers his beasts to wander from the common into the land of J. S., trespass lies.<sup>3</sup> So too, where one being seized of two hundred acres of common moor, enfeoffed another of fifty of them: and into these fifty acres the feoffee put his beasts, which, for want of inclosure, strayed into the residue of the moor, and were there distrained damage-feasant: it was held to be a good distress, “for the purchaser is holden by law to enclose or guard his beasts within the fifty acres, and so it seems ought the lord of the residue to do as to his beasts: and so it was adjudged this term.”<sup>4</sup> And the latter part of this position, though somewhat extrajudicial, ought, however, to exclude a question that has been sometimes agi-

<sup>1</sup> 3 Bl. Com. 210. 2 Selwyn N. P. 7th Ed. 1314.

<sup>2</sup> Whiteman v. King, 2 H. B. 4.

<sup>3</sup> Bro. Trespass, pl. 345. 2 Roll. Abr. 565. Common pur cause de vicinage will sometimes form an excuse for such trespass. See Plea, 3 Chitty on Pl. 1113.

<sup>4</sup> Dyer, 372. h. and see Churchill v. Evans, 1 Taunt. 529.

tated, whether feoffor or feoffee is in such cases the party bound to enclose ;<sup>1</sup> for it is manifestly incumbent on each to prevent his beasts from straying into the other's lands, and neither, consequently, can be bound to put up and maintain a fence *for the benefit of the other*, unless by the express terms of the conveyance.<sup>2</sup>

Suppose then A and B to be the respective owners of two adjoining closes, and A to be desirous of making a hedge to keep his cattle within the limits of his own land. The way of doing this, or (which, for our purpose, is the important consideration) the way in which the law considers it to be usually done, is for A to dig a ditch along the very extremity of his own close taking care in so doing not to trespass upon his neighbour's, and of course throwing up the soil dug out, upon his own land, in the form of a bank afterwards planted.<sup>3</sup> Hence arises the first presumption as to the ownership of hedges, namely, that on whose side of the ditch the hedge is, to him belong both it and the ditch.<sup>4</sup>

It seems to be an opinion, not uncommon in some parts of the country, that the owner of a fence consisting of a bank and ditch, is entitled to widen his ditch, by cutting the outer edge, if the area of the ditch, and base of the bank together, do not measure the width of eight feet, i. e. four feet for the base of the bank, and four for the ditch. That this is a mistaken opinion is obvious ; since, as a general rule, we have seen that his land cannot extend beyond the ancient external limit of the ditch, so that if he goes further, he must cut into his neighbour's soil.<sup>5</sup>

If there are two ditches, one on each side an ancient hedge, then the property in the hedge must be ascertained from the exercise of acts of ownership upon or about it ;<sup>6</sup> such as felling the timber, taking the loppings, scouring the ditches, or making repairs.

Making the repairs is often a duty incumbent on the owner of the hedge. It arises, however, in various ways. Some-

<sup>1</sup> In *Doyle v. Drake*, Moore 775. the court was divided whether vendor or purchaser should make the inclosure.

<sup>2</sup> *Boyle v. Tamlyn*, 6 B. & C. 329.

<sup>3</sup> *Vowles v. Miller*, 3 Taunt. 137.

<sup>4</sup> *Selwyn*, N. P. 7th Ed. 1316. *Woodfall, Landlord and Tenant*, 543.

<sup>5</sup> *Vowles v. Miller*, 3 Taunt. 137.

<sup>6</sup> *Selwyn*, N. P. 7th Ed. 1316.

times, out of a legislative enactment, as in the case of an award to that effect, by the commissioners under an inclosure act;<sup>1</sup> at others, out of a specific agreement between the owners of adjoining closes, whereby the one agrees or covenants with the other to repair the fences dividing their respective lands. With respect, however, to such a covenant or agreement, which is said to be in the nature of a grant of a *distinct* easement, affecting the land of the grantor,<sup>2</sup> it will be right to observe, that it seems upon principle, incapable of being the subject of such an arbitrary and technical presumption as that whereon grants of easements are often founded; that is, on adverse possession or the mere enjoyment of such easements for a period of twenty years.<sup>3</sup> For this very artificial presumption is built upon the acquiescence of the owner of the land, in acts done thereon for a definite period, hostile to his interests, and which he might, and, as the law conceives, would, have prevented, unless there had been a grant of the easement in question:<sup>4</sup> but the act of repairing is quite consistent with the absence of any grant to or covenant with the opposite party, is favourable instead of adverse to the interests of that party, and to be explained by the obligation which the repairer is under to confine his cattle within his own grounds.<sup>5</sup> But a series of repairs, though not extending to time immemorial, is yet evidence of a grant or agreement to repair, to go to a jury; and it will be their business, as it seems, therefrom to infer or not a grant according to the ordinary course of natural presumptions.<sup>6</sup>

<sup>1</sup> It would exceed our design to go into the provisions of the General Inclosure Act, 41 Geo. 3. c. 109. with respect to fences; and we must, accordingly, refer our readers to the 9th, 24th, 25th, 26th, 27th, and 28th sections of that act; and see *Ellis v. Amison*, 1 B. & C. 70. and S. C. 2 D. & R. 161. With respect to highway acts, it need scarcely be noticed, that the owners of the inclosures are bound to repair the fences on each side, unless otherwise provided by the Act. 2 T. R. 282. Indeed, it has been held, that if trustees under a road-act turn a road through an inclosure, and make the fences at their own expence, and repair them for several years, they cannot be compelled to continue such repairs, without a special provision to that effect. *Ibid.*

<sup>2</sup> Per *Bailey J.* 6 B. & C. 339.

<sup>3</sup> See *Boyle v. Tamlyn*, 6 B. & C. 329.

<sup>4</sup> In *Starkie on Evidence*, page 1214, the nature of these presumptions is very ably discussed.

<sup>5</sup> See 5 B. & A. 237. and 3 Bingh. 115.

<sup>6</sup> *Boyle v. Tamlyn*, 6 B. & C. 329.

But the most frequent mode, in which such an obligation to repair is cast upon the owner of an adjoining close, is by prescription, when (to use the language of pleading) "he and all those whose estate he hath in the close, from time whereof the memory of man is not to the contrary, have made and repaired, and have been accustomed to make and repair, the hedges and fences between" the two closes.

In whatever way a title to have fences kept up by another is acquired, it invests the person possessing it with a right of action against the other party, if he sustains any damage from their being out of repair: as where his cattle escape through the fences and are lost, or injured, or trespass on the lands of third persons, and he is damnified in consequence.<sup>1</sup> And it is immaterial whether the damage arising from the ruinous or defective state of the fences, accrue to the proper cattle of the owner of the field, or to the cattle of others received into the field by him. As, where the bailee of a horse turned it out into his pasture-field, which was separated from a field of J. S. by a fence which J. S. was bound to repair, and the horse, owing to a disrepair of the fence, fell from one field into the other, and was killed; it was held that the bailee (who, from the particular circumstances of the case, was liable over to the bailor on account of negligence) might maintain an action against J. S. and recover the value of the horse.<sup>2</sup> And if cattle escape through defect of fences into the land of one bound to repair, as against the owner of the cattle, and are distrained damage-feasant, the owner of the cattle may bring an action of replevin against the tenant of the land, and plead in bar to an avowry of distress damage-feasant, that it was the tenant's duty to repair;<sup>3</sup> or if the tenant of the land bring an action of trespass *quare clausum fregit* against the owner of the cattle, either for the trespass of the cattle,<sup>4</sup> or the entry of the owner to drive them back,<sup>5</sup> he may plead the same plea by way of justification: "but if the tenant gives the owner of the cattle notice that they are upon his land, and the

<sup>1</sup> 1 Ventr. 265. Com. Dig. Case for Negligence, A. 3. Boyle v. Tamlyn, 6 B. & C. 329. Viner Abr. tit. Fences.

<sup>2</sup> Booth v. Wilson. 1 B. & A. 69.

<sup>3</sup> Doveston v. Payne, 2 H. Bl. 527.

<sup>4</sup> 2 Roll. Abr. 585. pl. 3. Com. Dig. Pleader, 3 M. 29.

<sup>5</sup> 2 Roll. Abr. 565. pl. 4. Com. Dig. Trespass.

owner of the cattle suffers them to continue there after such notice, they are then trespassers, and may be distrained for the damage done after the notice, or an action of trespass may be brought against the owner of the cattle for such damage ; and the tenant may state that fact in his replication by way of new assignment to a plea of escape through the insufficiency of fences, in case he brings trespass for the damage done by the cattle after notice ; or he may reply such fact to a similar plea in bar, in case he distrains for such damage, and the owner of the cattle brings replevin against him.”<sup>1</sup>

With the single exception, probably, of the case where a fence runs along the side of a highway, the duty of repair, where it exists at all, is not general as against the public at large, but particular, as against the proprietor of the adjacent close, or persons having an interest therein. To take advantage, therefore, either as plaintiff or defendant, of the duty of the opposite party to repair, the owner of the cattle must shew an interest in the close adjoining, or a right to put his cattle there,<sup>2</sup> or if the place out of which they escape be a way, he must shew that he was lawfully using the way, for the property therein is in the owner of the soil, subject to an easement for the benefit of the public.<sup>3</sup> If the cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came.<sup>4</sup> Hence, if there be three closes successively contiguous, and belonging respectively to A, B, & C, and A is bound to repair against B, but B is not bound to repair against C, and the beasts of C escape through the fence dividing the closes of B & C, and afterwards through the fence of A into the close of A, it is clear that A may distrain or bring trespass against C, for C is without excuse for his cattle being in the close of B. But on the other hand, if B were also bound to repair against C, as well as A against B, the better opinion seems to be, that C might justify, in order to avoid the circuitry of action that would otherwise ensue, for if A could maintain an action against C, C

<sup>1</sup> 2 Will. Saunders, 286 n. 4. Com. Dig. Pleader, 3 M. 29. and see 2 Leon. 96.

<sup>2</sup> Fitz. N. B. Hale's Com. 299.

<sup>3</sup> *Doveston v. Payne*, 2 H. B. 527.

<sup>4</sup> *Ibid.* Per Heath J. and see 3 Wils. 126.

would also be competent to recover over against A. There are conflicting authorities, however, on this point. In Bacon's Abr. Trespass, it is affirmed that A may recover against C; while the contrary is asserted by Sir M. Hale in his Comm. on Fitz. N. B. 299.

The onus of repair lies upon the actual occupier of the close, and not on the owner of the inheritance, where they are distinct persons; consequently, no action can be supported against the latter by one who is damnified by the non-repair, but it must be brought against the tenant in actual possession.<sup>1</sup> But it should seem that though the tenant is *prima facie* bound to repair, yet if it can be shewn that by agreement between him and the landlord, the latter has engaged to repair, the landlord is liable.<sup>2</sup> It is, in fact, part of the implied duty of every tenant to repair the fences belonging to his close, and he may take proper wood for that purpose without any assignment;<sup>3</sup> and the landlord, without any agreement for the tenant to repair, may maintain an action against him for non-repair, upon the ground of the injury done to the inheritance.<sup>4</sup> It was held formerly that where cattle escaped through defect of fences into a close, the lessee of which was bound to repair as against the owner of the cattle, they might be distrained by the landlord for rent as soon as they were levant and couchant there;<sup>5</sup> but "the settled distinction seems now to be that where a stranger's cattle escape into another's land by breaking the fences where there is no defect in them, or if the tenant of the land where the distress is taken, is not bound to repair the fences, though there is a defect in them, the cattle may be distrained for rent immediately, before they are levant and couchant; but if the cattle escape through the defect of fences which the tenant is bound to repair, they cannot be distrained by the landlord for rent though they have been levant and couchant, unless the owner of the cattle, after notice that they are in the land, neglects or refuses to drive them away, for the landlord shall not take advantage of his own wrong. But the lord or grantee of a rent-charge who

<sup>1</sup> Cheetham v. Hampson, 4 T. R. 318.

<sup>2</sup> 2 H. B. 349.

<sup>3</sup> Lutw. 1480. Whitfield v. Weeden, 2 Chit. Rep. 685.

<sup>4</sup> Cheetham v. Hampson, 4 T. R. 318. Per Lord Kenyon; but qu? in the case of tenant at will.

<sup>5</sup> 3 Salk. 136.



have nothing to do with the fences, may in such case distrain the cattle *after* they have been levant and couchant, though no notice is given to the owner; because their being no default in them as there is in a landlord, such notice is not necessary.”<sup>1</sup>

The obligation to repair is often extinguished by unity of possession, and this takes place where adjoining closes which once belonged to different persons, one of whom was bound to repair the fences between them, afterwards become the property of one and the same person.<sup>2</sup> So, if A is possessed of a close and bound to inclose against B, who has twenty acres adjoining, and A purchase one acre contiguously adjacent to the close, A shall not be compelled to inclose.<sup>3</sup> And if the person, so become the owner of the entirety, subsequently part with one of the closes, the obligation to repair will not revive,<sup>4</sup> but an express stipulation in the conveyance might of course have the effect of binding him, by way of agreement, to repair as before.

The ancient writ of *curia claudenda* being quite obsolete, the common form of action at present is case for the non-repair; and it is sufficient for the plaintiff in his declaration to allege generally that the defendant by reason of his possession is bound to repair, without shewing specifically how the obligation arises.<sup>5</sup> Trespass or case may be brought indiscriminately, where A is bound to repair against B, and A's cattle escape through the fences into B's close — trespass, because it is the plaintiff's ground and not the defendant's; and case, because the first wrong was a non-feazance and neglect to repair, and that omission is the gist of the action.<sup>6</sup>

Until recently, there were very many statutes in force relative to the malicious destruction of fences, but happily for the professional enquirer, by the 7th and 8th Geo. 4. c. 27. all previous statutes upon this head (with one or two minute or local exceptions) were repealed, and the provisions therein amended and consolidated by the following simple enactment in the 7th and 8th Geo. 4. c. 30. s. 23:—“If any person shall

<sup>1</sup> 2 Will. Saund. 290. n. 7. 2 Lutw. 1580. Dyer, 317; and see Jones v. Powell, 5 B. & C. 647.

<sup>2</sup> Boyle v. Tamlyn, 6 B. & C. 337.

<sup>3</sup> Fitz. N. B. Hale's Com. 299.

<sup>4</sup> Boyle v. Tamlyn, 6 B. & C. 337.

<sup>5</sup> Rider v. Smith, 3 T. R. 766. Anonymous, 1 Vent. 264. Boyle v. Tamlyn, 6 B. & C. 337.

<sup>6</sup> 1 & 2 Salk. 335.

unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common goal or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

To these remarks upon the subject of fences, it may be useful to subjoin, as in some measure connected therewith, a brief notice with respect to those narrow strips of land that are frequently found lying between highways and the adjacent inclosures; and the property in which is sometimes matter of dispute between the owners of such inclosures and the lord of the manor.

It must be remembered that to one or more of these persons the freehold of the soil of the highway, together with all profits above and under ground, must always belong, except where it is vested by an act of parliament in the road-trustees;<sup>1</sup> and that, though called the king's highway, he has nothing therein, except the passage over it for himself and his people;<sup>2</sup> insomuch, indeed, that an ejectment will lie for the soil of a highway, and the owner may recover the land subject to the easement of passage over it by the public.<sup>3</sup> It was formerly the law, and so it is, we conceive, at the present day, (though it is observable that Abbott, C. J. uses the past tense),<sup>4</sup> that if a public road was impassable, a passenger might go along the land by the side of it, and if there were an inclosure on the

<sup>1</sup> 1 East, 69.<sup>2</sup> 1 Roll. Abr. 392. 1 Burr. 143.<sup>3</sup> Ibid.<sup>4</sup> Steel v. Pricket, 2 Star. N. P. 469. Doug. 720. 3 Bl. Com. 36.

side and no sufficient way between the inclosure and the road, he might break the fence and go *extra viam* as much as was necessary to avoid the bad way.<sup>1</sup> It being then convenient for the public that the road should not be inclosed, it came to be the law, that where the same person was owner of the land on both sides and inclosed on both sides, he brought upon himself the onus of repairing the whole of the road. "If he enclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side, and the owner of the land enclosed on the other, he was bound to repair the whole."<sup>2</sup> Hence it followed, as a natural consequence, that when a person enclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads."<sup>3</sup> Hence the *prima facie* presumption that strips of land lying between a highway and the adjacent enclosure belong to the owner of the inclosure — a presumption not<sup>4</sup> confined to the case where the owner of that inclosure is a freeholder, but which arises equally where he is a copyholder.<sup>5</sup> And although it has not been directly decided that this presumption is applicable to the case where the owner of such inclosure is a leaseholder, yet the observations of Holroyd, J. on this point are so pertinent and weighty, as to leave little doubt of the fact of its being so. "It is very improbable," says that learned judge, "that when a lease is made of land near the high road, and there is between the highway and the land inclosed, a small quantity of uninclosed land of little or no use to the lord or lessor, that he should separate it from the rest, or reserve to himself such land."

There are various ways in which this presumption may be rebutted: by proof of the exercise of acts of ownership on the strips in question,<sup>6</sup> or possibly, on others similarly situated in the same road—as inclosure, or grant by the lord of the manor,

<sup>1</sup> 3 Salk. 182. Jon. 296, 7.

<sup>2</sup> 1 Sid. 464. Com. Dig. Chemin, A. 4.

<sup>3</sup> Steel v. Pricket, 2 Stark. N. P. 469.

<sup>4</sup> Ibid. 7 Taunt. 39.

<sup>5</sup> Doe dem. Pring v. Pearsey, 7 B & C. 304.

<sup>6</sup> Steele v. Pricket, 2 Stark. N. P. 469.

selling timber, or feeding cattle thereon, or taking the turf or soil : by shewing that the road is of modern date, and was carried through the wastes of the manor, and that the fence was then in existence : or if of modern date and carried through an inclosure, by shewing that such inclosure formed no part of the one in question : and if the strip be contiguous to or communicate with open commons, or large portions of land, the presumption is either done away or considerably narrowed.<sup>1</sup>

Such is the presumption, and such the various ways in which we conceive the case, to bear us out in saying it may be rebutted.

In analogy to this rule of presumption, the General Inclosure Act, 41 G. 3. c. 109. s. 11. enacts that the grass and herbage arising on roads made under the act " shall for ever belong to and be the sole right of the proprietors of the lands and grounds which shall next adjoin the said roads and ways on either side thereof, as far as the crown of the road."

From what has already been said in the former part of this article, it seems scarcely necessary to be here remarked, that if a stranger depasture his cattle on the grass and herbage last mentioned, or on the strips of land we have been considering, trespass quare clausum fregit may be maintained.<sup>2</sup>

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#### ART. VIII.—POOR LAWS.

1. *A Summary of the Law of Settlement.* By SIR GREGORY A. LEWIN.
2. *A Summary of the Laws for the Government and Maintenance of the Poor.* By SIR G. A. LEWIN.
3. *A Treatise on Parochial Settlement.* By EDW. JOHN GAMBIER, Barrister at Law.

IF subjects become clear and well understood in proportion to the number of treatises written about them, nothing can have been rendered more distinct and intelligible to the

<sup>1</sup> *Groce v. West*, 7 Taunt. 39.

<sup>2</sup> *Stevens v. Whistler*, 11 East, 51.

whole mass of the community than the poor laws. Without noticing the various tracts which have been published on insulated parts of the subject, or advertng to the treatises which were in vogue towards the end of the last century, there are at present in circulation, besides the works placed at the head of this article, new editions of "Bott on the Laws relating to the Poor;" "Nolan's Treatise of the Poor Laws;" and above all, because in the greatest circulation of all, the 24th edition of the fourth volume of "Burn's Justice;" and we hear threats of other publications on the same subject, "in the press and speedily to be published."<sup>1</sup> When works are thus unnecessarily multiplied, the public, because they have not leisure to examine each one of such a multiplicity of publications, are in danger either of neglecting the whole bundle of them, or of trusting to chance, the selection of the one they mean to use. Under such circumstances it is, that the labours of the reviewer are most useful. Knowledge is dearly bought, when all that is gained by reading through a bulky octavo is the knowledge that it was not worth reading. But when once that knowledge has been gained, it is almost a duty to raise a warning voice, and to save our neighbours from acquiring the same bitter experience. To point out those works or those parts of works which are worthy of perusal and study, to separate the wheat from the legal or literary chaff, is a work worthy of all acceptation: but it is a work difficult in all cases, and peculiarly so where a recently published law-book is the subject of remark. We do not mean that there is any great difficulty in forming an opinion on the merits of a law-book, but to express that opinion may, when it is unfavourable, appear peculiarly harsh and indelicate.

The utmost injury that a novelist or an essayist can sustain from cotemporary censure, is a diminution in the sale of his

<sup>1</sup> Since the article was written, one of these threats has been executed by the appearance of "The Laws relating to the Ordering, Relief and Settlement of the Poor," by J. W. Willcock, Esq. Barrister-at-law. Benning, 1829. It contains a greater mass of matter, and in a more satisfactory, if not a more scientific shape, than the works mentioned above. The statutes and cases are largely quoted; and, so far as we can judge from merely glancing through it, the book seems a better book for reference, though not perhaps so readable. Such, according to the preface, was the author's design.—*Edit.*

work, or perhaps some loss of literary reputation : the evil stops there, and affects him not in any other respect. Far otherwise is it with the lawyer ; with him, that which touches his reputation takes from him the means by which he lives. It is not therefore for light cause that severe censure should be bestowed. We trust that in the remarks we shall have to make on the works now under our review, we shall have no occasion for any thing of the kind. But we cannot be blind to what is going on among the publishing part of our profession. When we see works every day published which profess to be written with the sole object of throwing light upon some obscure branch of law, but which have been intended for no other object than that of advertizing the name and calling of their authors ; when we see that others, who style themselves barristers-at-law, allow themselves to become the mere hacks of the law-publishers, and even consent to put their names to works not written by themselves, we do think that those authors have no right to expect from us any great degree of forbearance ; and though we should regret exceedingly to hurt or offend any individual, there is something due to a profession which has been considered a liberal profession, and which we do not like to see lowered in the public estimation by the degradation of its members. — But it is time to turn to the subject more immediately before us.

The works placed at the head of this article are all treatises on the same subject, and written with the same design,—that of elucidating and rendering intelligible the laws which have been passed for the relief and settlement of the poor. Some work on this subject had long been wanted. Of the old works, the fourth volume of Burn, which under the head “ Poor,” professes to be a treatise on the Poor Laws, is imperfect in many respects. We mean not to detract from the great merit and utility which must always attach to the compilation of statutes and cases collected in the book called “ Burn’s Justice.” — To a country magistrate such a book is indispensable. But professional men, at any rate sessions lawyers, ought to carry their information a little farther. They ought to be acquainted with the principle of decisions as well as with the decisions themselves ; and although something like principle may possibly be extracted out of the

jumble of cases thrown together in Burn, it must be a work of labour. That book professes not to lay down general principles, but to give a collection of the cases and statutes under the different heads of parish law. There is another inconvenience attending the use of Burn, at least as far as regards a numerous body of those who must have recourse to some such book ; we mean the inconvenience resulting from many of the heads connected with the Poor Laws being scattered through the whole five volumes. The title " Poor," is indeed contained entirely in the fourth volume, but the titles " Apprentice" and " Bastard" are in the first volume, and we presume it is unnecessary to inform our readers how intimately those two heads are connected with the poor laws. This inconvenience will probably not be much felt, either by magistrates or by such practitioners of the law as are fixed in the country : but there is a numerous body of men who reside in London, but regularly go down to attend the quarter sessions in the various counties throughout England. To them it is a serious evil to have five large octavos to drag about with them, where a single volume could be made to answer every purpose. This inconvenience may appear trifling to many of our readers, but that it is really felt, is sufficiently evident from the avidity with which concise epitomes of the various branches of law are bought up by circuit and sessions barristers.

Next to Burn we must notice the elaborate treatise of Mr. Nolan. To this work one praise at least is due, that of being complete and containing within itself every matter connected with the Poor Laws. Beginning with some historical account of the degree of provision afforded to the poor before the passing of the 43 Eliz. c. 2. it goes on to explain the whole of their operation since that time. It treats of the local divisions of the country which are each to maintain their own poor, viz. parishes and townships : the poor-rate, or the funds provided within each of those districts for that purpose, including both the levying and distribution thereof : the settlement of the poor, or the circumstances which determine the parish or township, by which a pauper is to be relieved : the criterions of pauperism, or the circumstance which entitle a person to relief out of the poor-rate : the officers appointed for the government and superintendence of the poor : and the proceed-

ings to which recourse may be had, when necessary for the purpose of enforcing the Poor Laws. A mass of information on each of these subjects is to be found in Mr. Nolan's treatise; but unfortunately in no very luminous order. It wants two great requisites to a good treatise; conciseness and precision.<sup>1</sup> Though perhaps a more readable book than Burn, it may be more easily read by taking each subject in the order pointed out by the index at the end of the volume, than by following the author's arrangement. Notwithstanding all their defects, the works of Burn and Nolan have long been used as text books, though probably more from want of better treatises on the subject, than from any intrinsic merit. Whether any of the modern publications are likely to supersede them, we leave our readers to judge for themselves. Our object in reviewing them, is to direct the attention of our readers to them, and to state with fairness, both what they do, and what they do not contain.

Sir Gregory Lewin's first volume professes to be a summary of the law of settlement; Mr. Gambier's book is a treatise on the same subject. Mr. Gambier has confined himself most rigidly to that part of the Poor Laws which he professes to treat of; Sir Gregory prefixes to his summary of the law of settlement an introductory chapter, which he states to be, on the authority of justices of the peace in settlement cases. This chapter is, in fact, a part of what Jeremy Bentham would call the code of procedure; it is a part only of that code, being confined to one part of the proceedings for the purpose of enforcing the Poor Laws, viz. the proceedings before justices at their petty and general sessions for the removal of a chargeable pauper to the parish in which his settlement is. The author's subject in this chapter seems to have been to make his book useful, by giving a sketch of the proceedings in which only it is that questions of settlement can arise. As to scientific arrangement, he appears not to have considered it worth attending to; in this chapter on the authority of justices, we find four sections on the effect in evidence of orders of removal confirmed, discharged, and unappealed against, whilst the effect of a certificate of settlement is reserved for a separate

<sup>1</sup> It is also occasionally inaccurate.



chapter, and placed at the end of the book. Why the author should not have brought under one head the evidence derivable from orders of removal, from certificates, and from certain other sources peculiar to the law of settlement, we cannot find out. To the same neglect of classification and arrangement we must attribute it, that in the same chapter on the "authority of justices," we find a section headed thus; "persons concerning whose capacity to acquire a settlement, questions have been raised:" and in this section the author considers the cases of foreigners, persons attaint, deserters from the army, and married women. Now, though it may be very proper to consider the several qualifications of these persons to acquire a settlement in a work written expressly on the law of settlement, we do not see how their capacity or incapacity can with propriety be considered any part of the authority of the justices, or constitute a section of a chapter bearing that title.

Both Sir G. Lewin and Mr. Gambier appear to have bestowed great pains on their respective productions; but no two works, both written on the same subject, can be so dissimilar in every respect. Mr. Gambier's treatise is written in a terse and precise, but somewhat cramped style; he is most systematic throughout; each head of law is reduced into a number of general divisions, and each of these again distributed into several subdivisions. Class and order, genus and species, are not more minutely attended to by naturalists, than are the divisions and subdivisions of settlement law by Mr. G. We like classification and arrangement in treatises on any subject, and in none more than in legal ones; but to give the reader the advantage of it, the printer must be as systematic as the writer. Though Mr. Gambier is a scholar, and may admire the ancient manuscripts, in which punctuation is entirely neglected, and no mark or visible sign shows where one sentence, or even one chapter, ends and another begins, he will find that the more widely he departs from that method the better. We moderns are accustomed to have the assistance of our eyes as well as our brains in mastering the subject we are reading about. The objections we are now making to the typography of Mr. Gambier's book may be rendered most intelligible by an instance. In the chapter

on settlement by apprenticeship, the subject is very properly divided into three heads ; 1. The binding necessary to constitute such an apprenticeship as may confer a settlement ; 2. The service under such binding ; and, 3. The residence of forty days in some one parish. He then goes on to treat of each of these parts of the subject in their order, and to subdivide them in his usual manner ; but our concern at present is not with the matter contained in the chapter, but with the manner in which it has been printed. Between each of these principal divisions of his subject, he ought to have left a space or break in the printing, sufficient to enable the eye to catch the beginning of each at a glance, without having to follow the subject till it is by degrees brought to what it is looking for. The same observation may, perhaps, apply to some of the subdivisions ; thus, at p. 43, there is no assistance of the kind we have been speaking of to inform us where the author ceases to treat of the rules which apply to every species of binding, whether parochial or voluntary, and where he begins to mention those particulars which relate only to a binding by the party himself. So, at p. 52, it is almost impossible to tell where he ceases to speak of young chimney-sweeps, and where he begins to treat in general of the service under indentures of apprenticeship. We have made these remarks, because we think the book would be more useful if they were attended to. Our readers may, perhaps, think them trifling ; they are, no doubt, very minor imperfections ; but it must be borne in mind that a great part of the persons most likely to use treatises of this kind are sessions lawyers, and that with them it is frequently necessary to find the subject they want instantly. On the trial of an appeal, suppose an objection to be raised by the opposing counsel, it must be answered at the time ; and unless the lawyer's text-book is such as to enable him to find what he wants in it without delay, he might as well be without it. The subject of these remarks is, therefore, not so totally unimportant as may at first sight appear.

We have already pointed out one of the faults of Sir Gregory's book—the great neglect of arrangement. His style is much freer and more easy than Mr. Gambier's, but it wants that precision and closeness in which the latter gentleman

excels. If the freedom of the one style sometimes degenerates into inaccuracy and looseness, the opposite quality of the other, straining hard at condensation, sometimes generalizes to such an extent that it may be difficult of comprehension. Sir G. Lewin has pursued the plan which Mr. Justice Bayley adopted in his summary of the law of bills of exchange, that of giving the principles of the law in the text, and the cases from which those principles are drawn in the notes. It is convenient, in all elementary treatises, to have short notes of the leading cases arranged under the proper heads; they serve as very useful illustrations of the general rules under which they are placed. We are sorry Mr. Gambier has availed himself so sparingly of this kind of illustration. The examination of the reported decisions of our courts are necessary to the thorough understanding of the law, just as a knowledge of the general theorems of mathematics and natural philosophy cannot be acquired without having previously worked out numerous problems and mathematical examples.

We have not yet noticed the second volume of Sir G. Lewin's works on the poor laws. Though the two volumes are distinct works as far as the title-page is concerned, they have the same connexion with each other that the first and second volume of a treatise usually have. In fact, he tells us, in his preface to the second volume, that it was intended as a companion to the first. The title of the second volume is "A Summary of the Laws relating to the Government and Maintenance of the Poor." It is not free from the faults which we have noticed in the first; but, with this exception, it appears to have been compiled with much care and labour. Our author appears to differ from the opinion we expressed some time ago, as to the legality of affording pecuniary aid to persons able and competent to work; see p. 238, et seq. He does not express any decided opinion on the point, but his leaning seems to be that such practice is legal; we do not wish to quarrel with him on that account, nor have we at present any inclination to enter upon the subject again. The book contains much miscellaneous information, not strictly referable to the government and maintenance of the poor; for instance, in giving an account of the duties and authority of churchwardens, he has not confined himself to a mere account

of their duties as overseers of the poor, which was all that his subject required of him, but has launched out into a detail of their ecclesiastical duties, such as repairing the church, preserving order therein, taking care of church ornaments, &c. Before concluding our remarks upon the two volumes of Sir Gregory, we must notice one instance in which his usual carefulness seems to have entirely forsaken him : we give the passage as it occurs at p. 42 of his first volume : —

“ Note, that on an appeal against an order of removal, justices who are rated to the relief of the poor in either of the contending parishes have not a right to vote. *In appeals concerning rates, this disqualification is removed by statute 54 Geo. 3. c. 170. s. 9.*”

What could have induced our author to make such an assertion we cannot conceive ; the statute to which he refers has no relation whatever to the matter.

We now return to Mr. Gambier. We have already noticed that he has confined himself to the law of settlement ; he has, in fact, confined himself within such strict limits in this respect, that, except on the law of settlement as it at present exists, not a word is to be found throughout the whole of his book. We are sorry he has pursued this course, as there are some subjects, which, though they do not directly establish or destroy any point of settlement law, tend to throw a light upon the whole system of the poor laws ; such, for instance, is the history of that system. We do not mean a lengthened detail of its history ; but he might have given a sketch of the manner of providing for the poor in ancient times, and of the rise and progress of the law of settlement and the present system of poor laws. We think that a preliminary chapter on this subject would have tended to make an elementary treatise, such as that under our review, more complete and scholar-like. It would have shown whence and how the different kind of settlements sprang up into importance ; it might also have shown the different requisites which, at different times, have been necessary to the completion of the same kind of settlement, and the object which the legislature had in view on each successive alteration of the law. If a sketch of this kind had been ably executed, the subsequent chapters of the book would have branched naturally from the

first, as from the parent stem ; at present, each chapter commences as if it were an independent treatise, unconnected with any thing which has preceded it or is to follow. Nor is this the only inconvenience ; a student commencing his reading on the law of settlement with Mr. Gambier's book, might be puzzled to account for some of the methods by which settlements are acquired ; for instance, after reading the chapter on derivative settlements, he might say, " I see certain rules very accurately laid down for ascertaining whether a derivative settlement is gained or not ; and if a case were stated to me, I could pronounce with certainty whether such case came within any of them : I see that the decisions of the courts are quoted as sanctioning these rules ; but whence did this settlement originate ? The poor laws are dependent, from first to last, on statutes, and the interpretation which the courts of law have put upon their provisions, but I can find no statute which enacts that a woman shall acquire a settlement by marriage." Though a tolerably acute student might possibly discover the reasons which induced the courts of law to create this species of settlement, we think it would have made the book more systematic to have stated them ; and we believe they could not have been stated so satisfactorily in any part of the book as in an introductory chapter on the progressive history of the whole of these laws. In such a chapter, after the various statutory modes of acquiring a settlement had been stated in their order, it would naturally occur to point out the difficulty which arose from the husband and wife having, according to the statutes, different places of settlement, and the impolicy of allowing the husband to be removed to one parish and the wife to another, thus separating those whom God had joined together. After stating the dilemma in which the courts would be placed, if they followed strictly the statutory settlements, their motive for acting in a legislative capacity would readily appear. In such a chapter might also be collected any general principles equally applicable to all the different kinds of settlement, as the effect of fraud upon the acquisition of a settlement ; but we have said sufficient upon this subject.

The chapter on settlement by apprenticeship is well executed ; but there is nothing perfect under the sun, and accord-

ingly we have some faults to notice in this chapter. First of all we do not like the slovenly way of using the term "a good apprenticeship," in the sense of "such an apprenticeship as will entitle the person who has served it to a settlement." We are aware that Mr. Gambier is not the only writer who is chargeable with this carelessness of expression. All the authors who have written on the law of settlement have been guilty of the same inaccuracy. In fact, we much doubt whether some of them were aware that an apprenticeship might be perfectly good and binding between the parties to it, but still be insufficient to entitle the apprentice to a settlement. Another objection we have to this chapter is the entire omission of a class of cases, which we think ought to have been noticed. The cases we allude to are those which have been decided on the effect of apprenticeships, intended by the parties for parish apprenticeships, or in which the parish officers have so far interfered as to pay the expences incurred, but which, from the omission of some of the formalities requisite to a parish binding, have been held not to be parish apprenticeships, but still to have been binding between the parties, and to have conferred a settlement on the apprentice. Such are the cases of *Rex v. Kilby*,<sup>1</sup> and *Rex v. Arundel*.<sup>2</sup> The practice had become so prevalent among parish officers, of apprenticing out poor children, without observing the forms necessary to constitute them parish apprentices, that the legislature thought proper to interfere, and prevent such practice for the future.<sup>3</sup>

The chapter on settlements, by renting a tenement, marshals settlements of that kind under three heads. The first applies to cases where the settlement was gained,<sup>4</sup> previous to the passing of the statute 59 Geo. 3. c. 50. : the second comprehends such as were acquired between the passing and the repeal of that act : and the third relates to settlements under 6 Geo. 4. c. 57. We think the Court of King's Bench might

<sup>1</sup> M. & S. 501.

<sup>2</sup> 5 M. & S. 257.

<sup>3</sup> See 56 Geo. 3. c. 139. s. 11. Gambier, p. 48.

<sup>4</sup> It would have been as well if Mr. Gambier had stated that the settlement must be completely gained under the previous statutes, before July 2, 1819, and June 22, 1825, respectively, or the settlement will, in all respects, be subject to the provisions of the subsequent statutes. See *Rex v. St. Mary le Bone*, 4 B. & A. 681. *Rex v. Ringstead*, 7 B. & C. 607.

have saved authors the trouble of publishing, and themselves the trouble of deciding, any cases under 59 Geo. 3. c. 50.; and in doing so, they would have saved parishes the expence of litigating questions under an act which remained in force only six years. The 13 & 14 Car. 2. c. 12. was the first statute which entitled to a settlement the person renting a tenement of 10*l.* a year. The statute 59 Geo. 3. c. 50. imposed several restrictions on this mode of acquiring a settlement; but this last act was repealed by 6 Geo. 4. c. 57., and this statute enacted that, from the time of its passing, no settlement should be gained by renting a tenement, except under the restrictions which it imposed. Now as the 59 Geo. 3. c. 50. is repealed, it seems singular that the Court of King's Bench continue to act upon it as if it were still in force with respect to settlements gained between July 2, 1829, and June 22, 1825. The point was made, but overruled, in *Rex v. Carshalton*.<sup>1</sup> It is not our intention to go back into any ancient learning on the effect which the repeal of a statute has upon cases occurring previous to its repeal, but not litigated till afterwards; but there are some modern cases which appear inconsistent with the decision of the court in *Rex v. Carshalton*. These we shall proceed to state. The first case we shall notice is *Rex v. M'Kenzie*.<sup>2</sup> The prisoner was tried for stealing privately in a shop. The 10 & 11 Wil. 3. c. 23. deprived persons guilty of that offence of the benefit of clergy. The 1 Geo. 4. c. 117. repealed the 10 & 11 Wil. 3. c. 23., and substituted other punishments in lieu thereof. The theft in question was committed before the passing of 1 Geo. 4. c. 117., but the prisoners were not tried till after that act had passed. The judge who tried them, having some doubt under which of those statutes the prisoners should receive judgment, reserved the point. All the judges were of opinion that the prisoners could not receive judgment under either; they could not be punished under 10 & 11 Wil. 3. because that act was repealed; nor could they under 1 Geo. 4. because that statute had no retrospective operation. The next case we shall cite is that of *Maggs v. Hunt*.<sup>3</sup> In this

<sup>1</sup> 6 B & C. 94, 5, & 6.

<sup>2</sup> Russ. & Ry. C. C. R. 429.

<sup>3</sup> 4 Bing. 212.

case an act of bankruptcy had been committed by a trader before the day on which the 6 Geo. 4. c. 116. (which repealed all former bankrupt acts) came into operation. A commission was sued out against him after that act had come into operation. The Court of Common Pleas held that the commission could not be supported, because the act of the trader which was relied on as an act of bankruptcy was so, if at all, under the old statutes, no other being then in operation; but it could not now be an act of bankruptcy under those statutes, because they were all repealed by 6 Geo. 4. c. 116. and it could not be so under the last mentioned statute, because that statute had no retrospective operation. The same principle is recognized in *Rose v. Blakemore*,<sup>1</sup> and *Bell v. Bilton*.<sup>2</sup> And in those statutes which repeal prior ones, but where it is intended that the repealed acts shall still operate upon cases occurring previous to the repeal, express provisions to that effect are introduced: thus the 7 & 8 Geo. 4. c. 27., which repeals a great number of statutes, repeals them in the following manner: "Be it therefore enacted, that the said acts (reciting their titles) shall be and continue in force until and throughout the last day of June, in the present year, and shall from and after that day be repealed; except so far as any of the said acts may repeal the whole or any part of any other acts; and except as to offences and other matters committed and done before or upon the said last day of June, which shall be dealt with and punished as if this act had not been passed. The repealing clause of Lord Lansdowne's act, 9 Geo. 4. c. 31. s. 1. is in the same words. We think it pretty clear what was the opinion of the persons who framed the above statutes, as to the effect which an unconditional repeal of the previous acts would have had upon cases which occurred before their repeal, but which were not the subject of judicial inquiry till afterwards.

At p. 75, Mr. Gambier has been led in an error, which at the time his book was written, very generally prevailed: but the error is attributable to what fell from the Chief Justice of the King's Bench, in delivering judgment in *Rex v. North Collingham*, rather than from any mistake of his own. The error we allude to, is with respect to the degree of occupation

<sup>1</sup> Ry. & M. 382.

<sup>2</sup> 4 Bing. 615.



which the yearly tenant of a house must exercise, so as to acquire a settlement under 59 Geo. 3. c. 50. Our author lays it down, that where part of the house is sub-let, and in some degree divided from the rest of the house, the division must not be so complete as to make the two parts distinct houses, but in such manner, that the whole house or building could still be charged as his house or building in an indictment for burglary. But since the publication of Mr. Gambier's book, the case of *Rex v. Great Bolton*,<sup>1</sup> has been reported, from which it appears that the settlement of the mesne tenant is not affected, although the division between the part of the house sub-let, and the part retained by such mesne tenant be so complete, that a burglary committed in the undertenant's part must be laid in an indictment to have been committed in the house of the under-tenant.

We also think Mr. Gambier has mistaken the meaning of the 59 Geo. 3. c. 50., in another respect. He states it to be sufficient, that the tenement should be *bonâ fide* hired by the tenant for the sum of 10*l.* a year at the least. We think that, under that statute, it is also necessary that the tenement should be of the yearly value of 10*l.* Previous to the passing of 59 Geo. 3. c. 50., it was necessary to prove that the tenement was of the yearly value of 10*l.*; and there is nothing in the 59 Geo. 3. c. 50. to supersede that proof. It was not till the 6 G. 4. c. 57. enacted that it should not be necessary to prove the actual value of the tenement, that such proof became unnecessary.

We cannot altogether agree with Mr. Gambier, in the effect which he seems to think ought to be attributed to the phrase "under such yearly hiring," in the 6 Geo. 4. c. 57. We cannot think with him, that the occupation was intended to begin and end with the year for which the tenement is rented. If such had been the intention of the legislature, it would have been easy for them to have said that the settlement should not be gained, unless the tenement should be occupied *during the said term*, under such yearly hiring, &c. Neither can we agree with our author that the expression, "under such yearly hiring," points at a single hiring only, and that it may not include a plurality. We think that the expression referred

<sup>1</sup> 8 B. & C.

to, no more points out a single hiring, than the word tenement points out that the tenement is to be single and undivided. Yet there does appear to be a distinction between the corresponding clauses of the two statutes on this subject; and although it is difficult to grope our way without the light of judicial decisions, we will try to explain what we conceive to be the distinction between the two statutes. Under the 59 Geo. 3. c. 50. the tenement might consist of various parcels, taken at various times and of different landlords. The 6 Geo. 4. c. 67. requires that the various parcels of which the tenement is composed, should all be occupied during the year's occupation, in virtue of which a settlement is claimed, under one or more yearly hirings; whereas all that seems necessary under 59 G. 3. c. 50. is, that these parcels should be held for a year altogether, of which forty days should be under a yearly hiring, but whether the whole year's occupation were so or not appears immaterial.

We could have wished that our author had given us these statutes on renting a tenement more at length, as when a new case arises differing from those already reported, it must be utterly impossible for those who use Mr. Gambier's book only, to determine whether it does or does not fall within the provisions of these statutes, as they have not the statutes to refer to; but with the exceptions we have pointed out, we approve very much of Mr. Gambier's book. It is the most systematic, and logical in its arrangement, of any book on the subject hitherto published.

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ART. IX. — CODIFICATION CONTROVERSY — MIS-STATEMENTS  
AND MISTAKES OF MR. HUMPHREYS.

*A Contre-Projet to the Humphreysian Code; and to the Projects of Redaction of Messrs. Hammond, Uniacke and Twiss.* By JOHN JAMES PARK, Esq. Barrister-at-Law. London, J. & W. T. Clarke, and John Murray, 1828.

THIS is a very valuable work; and, we hope and trust, will meet with general attention. It specifies the causes to which the complication of laws is attributable, and proves from the con-

stitution of society that those causes can never cease to operate; that the systems of civilized communities must always be voluminous; and that we should rather add to than diminish the evil arising from a multitude of laws, by recasting them in a new mould, or adopting any of the plans of redaction which have, of late, been popular.

"General rules can never be laid down accurately at first. Experience only can point out their proper qualifications, limitations, exceptions and relative bearings. This experience we possess in the volumes of judicial controversies to which the unwritten system has given birth."<sup>1</sup> So says an advocate for codes, and we readily admit the remark, for, in our opinion, it forms an argument against them. Our law libraries are large, because the number of qualifications, limitations, exceptions and relations is excessive. Leave them out, and you throw away your experience: re-arrange them with a view to the retrenchment of superfluities, and if so much as the mode of expression is altered, "the quality of fixedness or settled interpretation is lost." To demonstrate and exemplify this, is the object of the work before us; and we really think that no man of reflection, on a patient perusal, could help arriving at the most important of the author's conclusions. Many, doubtless, would continue to believe in the possibility of improving our system by a general legislative revisal; but very few would persevere in maintaining that the entire corpus of the laws of property (English, French or Dutch) ever was or ever can be comprised in 518 moderate octavo pages.<sup>2</sup>

We have said "a patient perusal;" and most assuredly this book requires it. In his anxiety to omit nothing which could strengthen his argument, Mr. Park has accumulated a mass of authorities which it is extremely exhausting to go through; and which, of course, are somewhat tautologous. There is, too, a want of arrangement; and a division into chapters, with a table of contents, would add considerably to (what Mr. Parke, who is fond of coining words, might call)

<sup>1</sup> M. Hammond's Correspondence with the Commissioners of New York, &c. These observations are quoted by Mr. Humphreys (Letter, p. 12.), and termed "most original." We have a high respect for Mr. Hammond; but Mr. Bentham said the same thing in his papers on codification, and the remark has been quoted by Mr. Twiss, Mr. Dodd, and ourselves (No. I. p. 7.)

<sup>2</sup> Mr. Humphreys. See the quotation, post.

the manageableness of the work. Indeed, the best writers against codification seem determined to make themselves comparatively unreadable. Mr. Cooper has thought proper to publish his enlightened views and sound information in a foreign dress:<sup>1</sup> whilst Mr. Park and his publishers have been doing their best to contract the circulation of the *Contre-Projet*, within the smallest compass its merits will allow. What could induce him to invent such a name? Why make Mr. Humphreys accessory to the formation of a new adjective? Why, above all, charge 15s. for a work containing less letter-press than our second number? Surely Messrs. Clark and Murray should have found out ere now that what Swift said of the arithmetic of the customs — “two and two do not always make four”—is just as applicable to bookselling. They have shewn in this respect a lack of judgment, the effects of which must be felt by the cause; and these, therefore, we shall endeavour to neutralise by a slight extension of our article. On the practicability of amending the laws of real property, indeed, we shall say nothing till a report on that subject appears; and we cannot go at length into the nature of codes without occupying a most unconscionable space and repeating portions of our leading article. Yet, convinced as we are that the particulars just alluded to have operated, and must continue to operate, as drawbacks on Messrs. Cooper and Park, we shall very briefly undeceive the public with regard to a few of Mr. Humphreys’s pretensions.

We readily allow him the praise of having given an impulse to the spirit of improvement. He was lucky in producing a work, evidently planned and laboured at for years, at a period when the public were prepared to receive it; and a great deal depends on such coincidences. Sir Samuel Romilly was abused for suggesting, what Mr. Peel is universally commended for executing; and had Mr. Humphreys’s book appeared ten years ago, he would not have been lauded in the *Quarterly*; though he might have got a notice in the *Edinburgh*, and very possibly a puff in parliament. It is also undeniable that many of his amendments are well worth adopting. When a man clears away a whole system, it were odd, indeed, if he did not remove a nuisance or two. But after saying this, we have done with

<sup>1</sup> *Lettres sur la chancellerie, &c.*

admissions ; our courtly complaisance will carry us no further : we cannot join in lauding a gentleman, who never grapples with the real difficulties of reform : mistakes or perverts examples and authorities ; and betrays a total want of candour in controversy. Such charges require proofs, and these shall instantly be given.

In the first place we request attention to the following passages given at length from Mr. Humphreys' works : —<sup>1</sup>

I shall now proceed to the second and more agreeable part of my task, and endeavour to point out the suitable correction of the incongruous and overwhelming mass of laws which has been exhibited to the reader. There are two modes of effecting this : one by applying partial remedies, wherever the institutions are redundant, inconsistent, or deficient ; — the other, by framing an entire system of the laws of real property. I shall give each a full, and, I trust, an impartial consideration.

More than two centuries ago, the present subject attracted the attention of a lawyer and a philosopher, who classes among the brightest ornaments of this country ; and who, in having pointed out *experiment* as the true road to natural science, has conferred on mankind an obligation which will cease only with their race. In his treatise, *De Augmentis Scientiarum*, lib. viii. Lord Bacon has the following aphorisms on the excessive accumulation of laws : —

"*Aphorismus LIV. Duplex in usum venit statuti novi condendi ratio. Altera statuta priora circa idem subjectum confirmat et roborat ; dein nonnulla addit, aut mutat. Altera abrogat et delet cuncta quæ ante ordinata sunt ; et de integro legem novam et uniformem substituit. Placet posterior ratio ; nam ex priore ratione ordinationes deveniunt complicatæ et perplexæ ; et quod instat agitur sane ; sed corpus legum interim redditur vitiosum. In posteriore autem major certe est adhibenda diligentia dum de lege ipsâ deliberatur ; et anteacta scilicet evolvenda et pensitanda, antequam Lex feratur ; sed optimè procedit per hoc legum concordia in futuro.*"

In the next section, "*De novis digestis legum*," the fifty-ninth Aphorism is to the same effect, and highly stimulating to legislators who may undertake such a task.

"*Si leges aliæ super alias accumulatæ in tam vasta excreverint volumina, aut tantâ confusione laboraverint, ut eas de integro retrac-tare, et in corpus sanum et habile redigere ex usu fit ; id ante omnia agito, atque opus hujusmodi opus heroicum esto ; adque auctores talis operis tanquam legislatores, et instauratores rite et merito numerantur.*"

<sup>1</sup> All the italics are his.

On the practice which, from the inertness of the legislature, has been so prevalent in our laws, of reconciling their inconsistencies by judicial refinement, the fifty-sixth Aphorism is couched in the following pointed language : —

“ Neque vero contraria legum capita reconciliandi, *atque omnia (ut loquuntur) salvandi* per distinctiones subtiles et quæsitæ, nimis sedula aut anxia curia esto. *Ingenii enim hæc tela est.* Atque utcunque modestiam quandam et reverentiam præ se ferat, inter noxia tamen censenda est ; utpote quæ reddat corpus universum legum varium, et male consuetum. Melius est prorsus, ut succumbant deteriora, et meliora stent sola.”

What our great countryman conceived, has been performed in modern times by the energy of the French nation, aided by the genius of Napoleon, whose boast it was (and apparently with truth), that he should descend to posterity with his Code in his hand. That, in some instances, its principles, in others, the aptitude of the institutions to the objects proposed, have been found open to observation, is not to be denied. But, in discussing them, let not the faults of the statesman be visited upon the merits of the legislator. Rather be it recollected, that this forms the first pure and entire system of civil jurisprudence ever presented to the world.

Most of the enlightened nations on the continent of Europe, have profited, or are profiting, of this great example, to frame their civil institutions anew, on principles suited to their present social state. The free and intelligent government of Bavaria,—the different states along the Rhine, and in its neighbourhood,—the kingdoms of Prussia, Denmark, and Sweden, — the newly-formed constitutional government of Portugal, which, in announcing its own establishment, has promised, as one of the first results of this inestimable blessing, the formation of codes of civil and criminal jurisprudence, a pledge which it is now in the act of redeeming,—the *Code Civil—Des Pays Bas* I have purposely rendered the last of this catalogue ; as feeling somewhat warranted, from an attentive perusal of its contents, and from an assurance with which I was lately honoured on the spot, by one of the most eminent of its composers, in enumerating and holding up to our imitation, some of its leading features ; and vouching for their *working qualities*. With the advantage of having followed the Code Napoleon, of which it has fully availed itself, it forms, in my judgment, a masterpiece of correct arrangement and sound institutions. They<sup>1</sup> flow as natural deductions, each from the preceding one ; they are framed to meet the necessities and habits of society, but so as to prevent the caprice or vanity of individuals from working

<sup>1</sup> What are “ they ” ? The same inaccuracy occurs in the pamphlet, p. 10.

any political evil. No fictions, either grounded upon or invented to elude, superannuated laws,—no separate jurisdictions for distinct modifications of the same property,—or for instructing the *deciding* judge as to the law or the fact—no interposition of nominal interests or circuitous remedies,—no defeasance of legal rights on alleged equitable grounds of *favour, affection or malice*. Each expression seems weighed as in a balance ; and the entire *corpus* of the laws of property, both real and personal, is comprised in 518 moderate octavo pages.—p. 215 to 219, 2nd edit.

From this quotation we understand Mr. Humphreys to be of opinion, that the plan adopted by the framers of the Code Napoleon was essentially the same as Lord Bacon's plan of amendment : that Lord Bacon's plan is to be collected from the Aphorisms cited above : that the Code Napoleon is a pure and entire system of civil jurisprudence : and that the Code Civil of the Netherlands, having fully availed itself of the Code Napoleon, comprises the entire corpus of the laws of property, both real and personal, in 518 moderate octavo pages, and had been in operation long enough to enable Mr. H. to vouch for its working well. We proceed to take down a few more of his opinions.

Even in Lord Bacon's time, when law books did not reach a fiftieth part of their present number, the evil was deeply felt, and is strikingly described in the following Aphorism, respecting the multiplication of *text* authorities ; which form one among the many sources of the over-accumulation of laws.

“ *Aphorismus LXXVIII.* Nihil tam interest certitudinis legum, quam ut Scripta Authentica inter fines moderatos coerceantur : et lacessat multitudo enormis auctorum, et doctorum, in jure ; unde laceratur sententia legum, *judex fit attonitus, processus immortalis atque advocatus ipse, cum tot leges perlegere, et vincere non potest, compendia sectatur*, glossa fortasse aliqua bona ; et ex scriptoribus classicis pauci, vel potius scriptorum paucorum paululæ portiones recipi possunt pro authenticis.”

Till the present indigestible heap of laws and legal authorities is consigned to oblivion, in vain will the public seek an uniform system of landed property.—p. 225, 226. 2nd edit.

From this we understand that our present law books should be swept away, and consigned to oblivion, and that Lord Bacon is cited in aid of the conclusion.

Again, (Mr. H. loquitur) : —

In support of the objection, that the untried rules of new systems of law are found of doubtful interpretation, the instance of the continental codes is often cited. I am, however, somewhat sceptical as to the fact. At home our information is necessarily vague, and is usually the result of the informant's feelings. Nothing short of close and repeated inquiries on the spot would afford any accurate result.

During two successive visits of some length to Paris, I was informed, that the deep-rooted influence of the ancient institutions in the late provinces of France, (some of which were ruled by the *Droit coutumier*, others by the *Droit écrit*, or civil law, and in many both these laws had an interfering sway,) for a long time impeded the operations of a system which, however superior, was utterly novel. Every voice, however, was raised in praise of the beautiful facility of reference afforded by the code. In the Netherlands, a country free from feudality, and principally commercial, and where their code has enjoyed the advantage of following that of France, I feel warranted in stating, from a high authority whom I have already cited, that their code *works well*.—p. 230, 231.

The next is from his pamphlet.

The main illustration, however, of the impracticability of a code, consists in your detailed representation of the defects and inconsistencies in the labours of Justinian ; the result of which, you inform me, was, to render the Roman laws still more voluminous and complicated than he found them.

A more unfortunate instance for your purpose could not have been selected. I had been urging the advantages of creating over correcting. In refutation, *you* adduce the failure, not of a new code of laws, but of an heterogeneous compilation, formed after the very design you advocate. What are the code, (which here, as well as in prior compositions of the same appellation, means merely a collection of imperial constitutions,) the digest, and the institutes of Justinian, even taken as you represent them, still more as exhibited in the luminous pages of Gibbon, but a vain attempt to correct the errors, reconcile the contradictions, and retrench the superfluities of conflicting and redundant institutions ; and, from the result, to produce a consistent body of laws ? How different, how superior would have been the achievement of a pure and entire system of jurisprudence, we may judge from the conjectural parallel in which our splendid historian indulges himself between the imperial legislator, and the project of the superior being who first grasped the absolute power of Rome.—Mr. Humphreys's Letter to Mr. Sugden, p. 8, 9.

From these quotations we learn, in addition that we learnt



before, that the system, established by the Code Napoleon, is utterly novel ; that, during Mr. H.'s visit to Paris, every voice was raised in praise of the beautiful facility of reference afforded by that code : and that in Mr. H.'s opinion, Justinian's labours, being " but a vain attempt to correct the errors, reconcile the contradictions, and retrench the superfluities of conflicting and redundant institutions, and from the result to produce a consistent body of laws," form a striking contrast.

We are thus particular in reducing Mr. H.'s remarks to distinct and simple propositions, because we are about to disprove each one of his statements, and dispute each one of his conclusions. Passing strange it is, that he should have escaped detection so long ; and wholly unprecedented has been his success in gulling our most distinguished cotemporaries. We begin with the appeal to Lord Bacon.

" What then is to be done ?" says the Edinburgh Review, after a gross exaggeration of the uncertainty of English law. " There are two methods, according to Lord Bacon. The one is to improve what exists, by making alterations and additions ; the other, at once to abrogate the old, and create ' a new and uniform system.' Lord Bacon was for the latter ; for, he adds, by the former method, regulations become more complicated and perplexed ; and that which presses is indeed effected, but the body of the laws is, in the mean time, rendered vitious. Quod instat agitur sanè ; sed corpus legum, interim, redditur vitiosum.—De Augm. Scient. This leads us at once to the works of Mr. Humphreys, &c. Founding himself upon the authority of Lord Bacon, and availing himself like a man of true liberality and wisdom, of the helps afforded by the Code Napoleon, he proceeds," &c.<sup>1</sup>

" Mr. Humphreys," says the Quarterly Review,<sup>2</sup> " introduces his own view of this momentous question by some apt citations from Lord Bacon's treatise De Aug. Sci. lib. 8." (and just below) " Mr. H. has done well to fortify his own decided preference, of *an entire new code of laws* for the regulation of landed property, over any plan for the adhibition of partial remedies, by the sanction of a name so high and venerable."

That Lord Bacon's is " clarum et venerabile nomen," no one pretends to deny : that it has been of great use to Mr. Humphreys, is plain ; but that " he has done well" in employing

<sup>1</sup> Edinh. Rev. for March 1827, p. 474.

<sup>2</sup> No. 68, p. 583. This article is attributed to Mr. Butler.

it, is by no means so clear as the Quarterly supposes. We consider that he has most shamefully abused it; and we shall presently show the reviewed and the reviewers, that there is literally no alternative between supposing them mistaken to an almost unprecedented degree, or Lord Bacon the most contradictory of men. When they prove that the aphorisms they quote, either justify their inferences or contemplate their plan, Lord Bacon's reputation is annihilated. Let therefore Mr. H.'s quotations be favoured with a careful perusal before passage is opposed to passage.

The first aphorism cited by Mr. H. refers solely and exclusively to statute law. It is particularly directed against that style of legislation which Sheridan ridiculed in a parody on "The House that Jack built."

"First then comes in a bill, imposing a tax; and then comes in a bill to amend the bill that imposed the tax; and then comes in a bill to explain the bill that amended the bill to impose the tax; next a bill to remedy the defects of the bill that explained the bill, that amended the bill that imposed the tax; and so on *ad infinitum*."—Between statute and common law, Lord Bacon invariably distinguishes: common justice to him requires that this be remembered.

The whole effect of Aphorism 59, (even taking it by itself, and passing by "the same effect"), is destroyed by the *Si*: Your *if* is the only peace-maker; much virtue in *if*. *If* laws require amendment and systematizing, they should be amended and systematised! We need no philosopher to tell us that. And where (granting Mr. H., what he must beg, to make use of this Aphorism,—the desperate condition of English law)—where does he find the mention of a plan or conception? We will show him one presently, expressly referring to the "*de integro retractare, et in corpus sanum et habile redigere*," but we defy him to find it in his own quotation.

The other Aphorisms (56 and 78) so evidently prove nothing, that we are at a loss to guess for what they were adduced. We are as fully convinced of the folly of attempting to reconcile contraries and retain every thing by means of subtle and far-fetched distinctions (which is the main point of Aphorism 56), as we are of the evil of "an erroneous multitude of doctors" (as Aphorism 78 expresses it); but to infer, that, be-

cause Bacon was for not saving every thing, he was therefore for destroying every thing : because he deprecated an increase of writers, he was therefore for consigning laws and legal authorities to oblivion ! — Why a man who can prove that can prove any thing. Let Mr. H. and the reviewers read the following passages, and make as fast as possible the only atonement in their power, a full and free confession of mistake. We shall use no Italics to fix attention ; there is scarce a word which does not tell.

In all sciences they are the soundest, that keep close to particulars ; and, sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law. But, howsoever that question be determined, I dare not advise to cast the law into a new mould. The work, which I propound, tendeth to pruning and grafting the law, and not to plowing up and planting it again ; for such a remove I should hold indeed for a perilous innovation.

Obj. V. It will turn the judges, counsellors of law, and students of law to school again, and make them to seek what they shall hold and advise for law ; and it will impose a new charge upon all lawyers to furnish themselves with new books of law.

Resp. For the former of these, touching the new labour, it is true it would follow, if the law were new moulded into a text law : for then men must be new to begin, and that is one of the reasons for which I disallow that course. But in the way that I shall now propound, the entire body and substance of the law shall remain, only discharged of idle and unprofitable or hurtful matter, and, illustrated by order and other helps towards the better understanding of it and judgment thereupon. — (Bacon's Proposal for amending the Laws, &c.)<sup>1</sup>

No one after this can help seeing the shallowness of those who have been quoting Bacon's remarks on statutes, as equally comprising all descriptions of law. But possibly Mr. H. and his coadjutors, do not stoop to read Bacon in English, and confine themselves to his Latin productions. This is the most charitable inference we find it possible to draw ; and, looking solely and exclusively to the Aphorisms, even then we can scarce help a conclusion, the expression of which would certainly be wrong. We must suppose therefore that Mr. H. applied himself to Bacon, as a man about to try the "Sortes" applies to his Virgil ; opened

<sup>1</sup> Works, vol. v. 346. Montague's edit.

a page at random, fixed his finger on the first sentence ; and looked neither above it nor below it, neither to the right hand nor the left. We will not, cannot, in common courtesy, believe that he knew of the following Aphorisms. They, it is true, are marked 60, 61, 62, 63, 64, and he quotes and relies on 59 : they, it is true, are the rest of a chapter of which he quotes the beginning ; yet, however heavy the tax on their charity, we beg our readers to impose it.<sup>1</sup>

OF NEW DIGESTS OF LAWS.

*Aphorism LIX.*—But if laws accumulated upon laws, swell into such vast volumes, or be obnoxious to such confusion, that it is expedient to revise them anew, and reduce them into a sound and solid body, intend it by all means ; and let such a work be reputed an heroic and noble work, and let the author of such a work be rightly and deservedly ranked in the number of the founders and restorers of the law.

*Aphorism LX.* — This purging of laws<sup>2</sup> and the contriving of a new digest is five ways accomplished. First, let all obsolete laws, which Justinian terms old fables, be left out. Secondly, let the most approved of Anti-nomies be received, the contrary abolished. Thirdly, let all coincident laws, or laws which import the same, and are nothing else but repetitions of the same thing, be expunged, and some one, the most perfect among them, retained instead of all the rest. Fourthly, if there be any laws which determine nothing, but only propound questions and so leave them undecided, let these likewise be cashiered. Lastly, let laws too wordy and too prolix, be abridged into a more narrow compass.

*Aphorism LXI.* — And it will import very much for use, to compose and sort apart in a new Digest of Laws, laws recepled for Common Law, which in regard of their beginning are time out of mind, and on the other side, Statutes superadded from time to time ; seeing in the delivery of a juridical sentence, the interpretation of Common Law, and Statute Law, in many points is not the same.<sup>3</sup> This Trebonianus did in the digests and code.

*Aphorism LXII.* — But in this regeneration and new structure of laws, retain precisely the words and the text of the ancient laws, and of the books of law ; though it must needs fall out that such a col-

<sup>1</sup> We quote from Wats's folio English edit. because we should be sorry for the most indolent reader to lose the benefit of Lord B.'s advice ; and we incline to think that Latin alone has sheltered Mr. H. so long. Not a single writer has hitherto questioned his claim to the Aphorisms. Even Mr. Park contents himself with turning the flank of his adversary, and so defeating him.

<sup>2</sup> (*Hypumodi legum expurgatio*, &c.) the aphorism cited by Mr. H. is thus expressly connected with the rest.

<sup>3</sup> This is another proof of Lord Bacon's meaning in his Aphorism on Statutes.

lection must be made by centoes and smaller portions ; then sort them in order. For although this might have been performed more aptly, and, if you respect right reason,<sup>1</sup> more truly, by a new text than by such a consarcination ; yet in laws, not so much the style and description, as authority, and the patron thereof, antiquity, are to be regarded : otherwise such a work might seem a scholastic business and method, rather than a body of commanding laws.

*Aphorism LXIII.*—In this new digest of laws, upon good advisement a caveat hath been put in, that the ancient volumes of law should not be utterly extinguished and perish in oblivion, but should at least remain in libraries, though the common and promiscuous use thereof might be retained. For in cases of weighty consequence, it will not be amiss to consult and look into the mutations and continuations of laws past, and indeed it is usual to sprinkle modern matters with antiquity. And this new corps of law, must be confirmed only by such, who in every state have the power of making laws, lest perchance, under colour of digesting ancient laws, new laws, underhand be conveyed in.

*Aphorism LXIV.* — It could be wished that this instauration of laws, might fall out and be undertaken in such times as for learning and experience excel those more ancient times whose acts and deeds they recognize, which fell out otherwise in the works of Justinian.<sup>2</sup> For it is a great unhappiness, when the works of the ancient are maimed and recompiled by the judgment and choice of a less wise and learned age ; but oft times that is necessary which is not the best.

Thus much be spoken of the obscurity of laws arising from the excessive and confused accumulation thereof. — (De Augm. Scient. lib. 8.)

It will be seen that the erroneous impression has been conveyed by quoting merely those parts of the Aphorisms in which an evil is stated or supposed. We have taken down the whole chapter to set the matter at rest, and Mr. Humphreys, we should suppose, must by this time have got a surfeit of Bacon ; yet we cannot help recommending to him the commencement of Aphorism 25. " Keep yourself within,

<sup>1</sup> (Si ad rectam rationem respicias.) Perhaps " abstract reason " is nearer the mark.

<sup>2</sup> In his offer of a Digest to James, Lord Bacon says, " Whereupon Justinian in the end recompiled both, and made a body of laws such as might be wielded, which himself calleth gloriously, and yet not above truth, the edifice or structure of a sacred temple of justice, built indeed out of the former ruins of books, as materials, and some novel contributions of his own." — Works, Montague's edition, vol. v. p. 357. Compare this with the passage quoted from Mr. H.'s pamphlet.

or rather on this side the limits of an example, and by no means surpass those bounds:"—(these are only commencing words, but what cares he for qualifying conclusions?—and also the following high legal authority, which, with a little straining, might be made to fit his own case.—

"The chancellor, (Lord Thurlow), in his reply, boldly asserted that he perfectly well remembered the passage I had quoted from Grotius, and that it solely respected natural but was inapplicable to civil, rights. Lord Loughborough, the first time I saw him after the debate, assured me, that before he went to sleep that night, he had looked into Grotius, and was astonished to find that the chancellor, in contradicting me, had presumed on the ignorance of the House, and that my quotation was perfectly correct.—What miserable shifts do great men submit to in supporting their parties!"<sup>1</sup>

Are miserable shifts confined to great men? or are they harmless when resorted to by others? We think not; and shall make no apology for dwelling upon this topic so long. All men of right feeling will thank us for vindicating "our great countryman:" for replacing his name, where he placed it himself, at the head of moderate reformers. The public, we trust, will henceforth see the necessity of inquiring before they approve, and make up as soon as possible for the late extraordinary delusion; or the noblest names in all the walks of life may be brought to second the most flimsy pretensions. If such a mode of interpretation is allowed to succeed, no degree of precision can fix an authority: no sentiments of veneration can save it: leave out, "the fool says in his heart," and you may prove from Scripture that, "there is no God."

The next assertions we incline to oppose are, the utter novelty of the Code Napoleon, its containing an entire body of laws, and the uplifting of every voice in praise of the beautiful facilities of reference afforded by it.

Were we to take a number of general rules deduced or framed by former text-writers, and pass them into a law, would that entitle us to the merit of novelty? Were we to cite the statute of frauds as containing the whole corpus of law relating to the subject matter, and leave out of the

<sup>1</sup> Anecdotes of the Life of Bishop Watson; written by himself. Vol. i. 359.

estimate the innumerable decisions by which every clause is interpreted or modified,—should we not be laughed at for our pains? Were we at the present moment to state that every voice in England has been raised to commend our system, should we not lie under a mistake? Yet something very like this will presently appear to have been said and done by Mr. Humphreys.

He must be familiar with the name of Dupin, and know that few men are better qualified to speak of French law.—

“The works of Pothier,” says M. Dupin, “have not been received as law; but they have obtained an equal honour, for more than three-fourths of the Code Civil have been literally extracted from his treatises.”<sup>1</sup>

With regard to the other codes, we believe Dr. Reddie’s useful and interesting pamphlet may be relied on.

The Code de Procedure Civil is merely a modification of the Ordonnance of 1667;<sup>2</sup> the Code Penal of 1810, of that of 1791; the Code des Debits et des Pieces, of that of 1795; and the Code de Commerce of 1807, is little more than a compilation from the ordonnances of 1673, 1681, and 1687.—Reddie’s Letter, p. 28.

We quote these passages to establish facts; but we are far from thinking utter novelty a merit, or the want of originality a fault. If general rules and principles were wanted, Pothier’s, which must have stood the test of experience, were far more likely to be sound than any formed on the spur of the occasion; and the same may be said of the old laws that were retained. Mr. Humphreys, in our opinion, would have greatly strengthened his case and brought himself much nearer to Bacon by describing things as they were; but he was searching out another cause for evils which are mainly owing to the vagueness and generality inseparable from excessive compression, and he fixed on novelty as the best he could find. We must confess, however, that since the publication of his second edition, Mr. H. has learned a little of the history of the code,

<sup>1</sup> Dissertation sur la Vie et les Ouvrages de Pothier; prefixed to his works, p. 115. Park, 105.

<sup>2</sup> This part of the statement we are able to confirm, “J’ai reconnu qu’un très grand nombre d’articles ont été formés de ceux de cette ancienne loi” (of 1607). De la Porte, Comment. Avant Propos.

and has employed his acquirements with considerable effect. In his letter to *The Jurist*, No. 4. p. 130, we find him saying—

Instead of such essential topics as these, the critic (Dr. Reddie) indulges himself in a declamation against the horrors of the French Revolution, and in a laboured effort to ascribe to the ambition of Napoleon, the chief formation of a code which was more than half completed for years before his name was heard of.\*

(*Note by Mr. H.*)—\* *Le Projet du Code Civile*, 1793.

Who would suppose after such an insinuation as this, that Dr. Reddie, to say nothing of the passage we just now quoted from him, gives a brief sketch of the rise of the code, and not only mentions the project of 1793, but makes it the ground of a taunt?—

The first attempt after the revolution at an organization of law, or even a return to order was laid before the National Assembly by Cambacérès in 1793, but rejected as “containing laws which had formerly existed, and antiquated prejudices, and besides, as not sufficiently based upon universal equality.\*

(*Note by Dr. R.*)—\* Some idea may be formed of what these laws were from Cambacérès’s *Discours Préliminaire sur le Projet de Code Civile*:—“Nul n’a élevé des doutes sur la nécessité du divorce lorsque deux époux changent de volonté.” It was also proposed to abolish all wills and testaments; and yet the work of the sages who have left upon record this monument of their wisdom is held up for imitation! *Letter*, p. 24, 25.

Are we wrong in supposing that Dr. Reddie means to taunt Mr. H. himself with holding up to admiration a code (the Code Napoleon) based on the project of 1793? The work of the sages alluded to has not, that we know, been individually commended by Mr. H. or his friends. He is a very dexterous casuist, but he will be kind enough to excuse us for suggesting that the next time he brings this charge against Dr. R., it would be advisable to take the ninth, tenth, eleventh, and twelfth lines, with one word of the thirteenth, at p. 27. These constitute a paragraph, of which much may be made: the word “formed” may prove as rich a treasure as “statute.” He must, however, be cautious in extracting it: “incedit per ignes”—the two next lines would demolish him.<sup>1</sup>

<sup>1</sup> These are, “As already observed, however, the idea of a code did not originate with Napoleon.”—Reddie’s *Letter*, p. 27.



So much for "utter novelty." In the next place, is the Code a pure and entire system of civil jurisprudence; and is every voice raised in praise of the beautiful facility of reference afforded by it? We take these assertions together, because the same authorities form an answer to both:—

The Code Civil [the writer is speaking of its first appearance] was so clear, so precise, so easy, there was no one who did not think he understood it, or might understand it if he chose. It was not studied, but bought as an ornamental volume to be consulted like a dictionary. Now our habits and language are changed. Twenty years of experience, and twenty volumes of decisions (of the supreme court,) have led to more accurate views of the new legislation.<sup>1</sup>

These sentences are so pat to the purpose, that we could not refrain from re-quoting them: and in a late number of the same work, the editors express themselves as "far from approving the ardour of the editor of the Jurist, or subscribing to the sentence of condemnation passed by him on the national institutions of his own country, compared with those of the continent"<sup>2</sup>—a protest doubly forcible from the fact of its occurring in the middle of an eulogium on the work in question.

Mr. Park's book is full of citations from French writers of authority to the same effect;<sup>3</sup> and to him, Mr. Cooper, Dr. Reddie, and our own leading articles in this and a former number, we must content ourselves with referring; merely stating, *en passant*, that from 1800 to Michaelmas Term 1827, there have been published in London 174 original treatises and compendiums upon different titles of the law, and during the same period 209 in France: that the Bibliothèque Choisie of Dupin (in which no books are recommended but what are "*rigoureusement necessaires*")<sup>4</sup> consists of 343 volumes: that the French have 100 volumes of laws and legislative decrees made since the Revolution:<sup>5</sup> that they refer to our statutes as examples of brevity:<sup>6</sup> that their reports are far more nu-

<sup>1</sup> Themis, vol. 8. published in 1826. Mr. Park, who quotes this passage, should have given the introductory story about the mode of using the civil law. See too, ante, Art. 1. p. 467.

<sup>2</sup> Tom. 9. 189.

<sup>3</sup> Park, 132.

<sup>4</sup> Ante, Art. 1. p. 485.

<sup>5</sup> These, like our statute book, are swollen with local, temporary, and personal ordinances. Park, 168.

<sup>6</sup> Id. citing Chateaubriand.

merous than ours;<sup>1</sup> and that they are equally referred to. "Nothing is so common now-a-days as the citation of adjudged cases. Men who have no other science, pique themselves at least on this. In the country, in particular, all doctrine proceeds from them: it is who can cite the most."<sup>2</sup>

Upon these grounds we think ourselves quite justified in repeating, that the French code no more constitutes the entire law of the country, than any one of our most unsettled statutes constitute the entire law of its subject-matter; and that Mr. H.'s information about "beautiful facilities" must have been "the result of the informant's feelings."

Our last topics are the code of the Low Countries, with the mis-statements and mistakes relating to it. We must first trouble our readers with another statement from Mr. H., taking for granted that the words "*working qualities*" and "*working well*" are not forgotten.

To the article "Descent," in Part 2, of the first edition, was appended, *A comparison between Primogeniture and Equal Partibility*. This the author has, on full reflection, withdrawn, as bearing rather a political than a legal character. Since the former publication too, he has perused the Civil Code of the Netherlands, and has traversed that country in almost every direction. The one establishes equal partibility, (Code Civil des Pays Bas, Tit. 2, a. 23, 28,) the other exhibits a country cultivated like a garden, with a peasantry thoroughly at its ease.<sup>3</sup>

Mr. Cooper, as every man must do, after collating this passage with the former mention of the code of the Low Countries, conceived Mr. H. to mean that the garden cultivation and the pococurante peasantry were the results of equal partibility; and that partibility was established by the code. Accordingly he very courteously suggested an *on dit* to the effect that the code of the Low Countries, whose *working qualities* were vouched for, was not in force when Mr. Humphreys wrote. This called forth a reply from Mr. H., in the form of a letter to the editor of the Jurist, which is, without exception,

<sup>1</sup> See our second Number, p. 203. note, and Park, 150.

<sup>2</sup> Dupin, Pref. to Jurisprudence des Arrêts.

<sup>3</sup> Mr. Humphreys' Pref. to 2d Edit. p. 9, 10. The relatives and antecedents of this paragraph are a little out of order. Mr. H. means to say that the Code establishes, &c. and the country exhibits a country, &c. which is quite natural.

the finest specimen of shuffling we ever remember to have seen. From it the following passages are taken.

I regret at being again compelled, as in the case of Mr. Reddie, to commence my reply by correcting a misrepresentation on the part of Mr. Cooper.

In preferring the charge in question, Mr. C.'s avowed object is to make me attribute the flourishing appearance of the Netherlands to "the admirable working quality (as he tauntingly and gratuitously terms it) of the new code." But how stand the passages to which he refers? The material one is contained in the preface to my second edition. It states my reasons for withdrawing from the work a comparison between primogeniture and equal succession, contained in the former edition. The article, I observe, "bore rather a political than a legal character. Since the former publication, too, the author has perused the civil code of the Netherlands, and has traversed the country in almost every direction. The one establishes equal partibility; the other exhibits a country cultivated like a garden, with a peasantry thoroughly at its ease." Not a word here respecting the admirable working quality of the new code. This latter expression however (bating the word 'new'), Mr. Cooper, after an evidently minute research, discovers in the second part of my work, and transports it accordingly to the tail of his quotation. But this would have squared ill with the very limited purpose (for which alone I cited the civil code) of illustrating equal succession. The only course left was, to sink the passage which stated this object, and to supply its place with an expression suiting Mr. Cooper's construction from some other part of my work. When *Peter* failed to find the desired expression in his father's will, he next sought to collect it *totidem verbis*.—Jurist. No. 4. p. 133, 134.

He next goes on to say, that "Mr. Cooper should have recollected, that the rule of equal succession was not introduced by the new Code Civil of the Netherlands;" it having, in fact, prevailed there time immemorial. And then—

Had it been otherwise, had either the Franco-Belgic or the new civil code substituted equal succession for primogeniture, the question, whether the latter code be in full operation, or be merely published (which Mr. C. conceives of such vital importance), would be of no moment; since in neither case could the difference of a few years have influenced the fixed habits of a long established civil government.—Jurist, No. 4. p. 134.

He then states his reasons for supposing that the said code was in force before he wrote. That it is not, even now, will presently be shewn; but let us first examine the above statement.

You, Mr. Humphreys, call "the admirable working quality," "taunting and gratuitous terms," on the part of Mr. Cooper. One of them is so: you did not use the term "admirable." You admit the "*working qualities*" however; but the expression was discovered "after an evidently minute search." Why, it stares us in the face in *Italics*—(the only *Italics* in the page,) in without exception, the most prominent part of your work: it is your cherished and treasured example: you are not satisfied with naming it once and leaving it to work an impression; but you reproduce it, in *Italics*, and, if possible, more unequivocally expressed than before, (at p. 231) as a clenching illustration, which cannot fail you, though the French code should. Nor was the "works well" reserved for your second edition: you had it before in your pamphlet, (p. 48.) and there, too, in *Italics*.

(Bating the word "*new*,") A mere cavil. Tell us at once that you did not mean "*new*," and then there will be something to talk about: but do not play the "*auceps syllabarium*," unless, at least, you have a chance of gaining by it.

("Mr. Cooper should have recollected that the rule of equal succession was not introduced for the first time by the new code civil of the Netherlands.") Should not Mr. H. have recollected something of the sort, before he talked of *establishing*? Mr. Cooper *did* recollect that the rule of equal succession was not introduced by the new code of the Netherlands; for he recollected that the code itself was not introduced; whilst Mr. H.'s recollection, or rather his knowledge, was found wanting in both particulars. If this is not the case, if Mr. H. was really aware of the antiquity of equal succession in the Netherlands, if the word "establishes" was only a slip, why did he state in the very sentence before that he had "perused the civil code of the Netherlands?" Was he looking in the *new* code for the *old* usage? Does he not see that, according to his own showing, he might just as well have told us that he had perused Justinian's Institutes, or (we wish he had) Lord Bacon's Aphorisms? It is, at any rate, *our* firm conviction that Mr. H. believed equal succession to have been introduced by the new code, and, in his eagerness to establish the correctness of his own views, forgot that years must elapse before the effects of such a change could become visible.

("The very limited purpose, for which alone I cited the civil code of illustrating equal succession.") He should have added "in my preface." As it stands, the passage is glaringly incorrect: couple it with the "evidently minute search;" bear in mind the evasive tone of the passage quoted from the Jurist, and you have before you a gentleman on the very point of eating his own words, and gradually summoning courage for the gulp. It may be doubted indeed whether the gulp has not been made already, for at the end of the Letter (Jurist, p. 136) we find the following passage:—

"Such seem the sum and substance of Mr. Cooper's *on dits*. To what conversational discussions, to whose light table-talk does he mean to attribute them? forming, as they do, the result of a toilsome effort *to wrest* (by transferring two passages which stood, one in the preface, and the other *in the closing part* of a work, into one sentence), that which the author had, by mere allusion to a particular mode of succession, assigned as a reason for omitting a digression in a former edition, *into a general description of the working effects of a code,*" &c. &c.

What can Mr. H. expect from such inaccuracies? We know, as well as he does, that the sale of his second edition has been flat, but there are at any rate a few copies about. To those who have not seen the work, it may, however, be necessary to state that it consists of two parts, and that one passage as to the *working qualities* of the code occurs at the fourth page of part 2, which he himself calls "the more agreeable part of his work (being p. 218 of the book); the other at the 16th page of part 2 (being p. 231 of the book), the book itself containing 381 pages. Mr. H. must have a strange notion of the *closing* part of a work.

("Which Mr. Cooper conceives of such vital importance.") So do we: so does Mr. H., assume what airs of nonchalance he may. It is ludicrous enough, to be sure, for English lawyers to be cavilling the best part of a year on such a question as whether a neighbouring state in close amity with us, and which hundreds of Englishmen have visited and returned from since the commencement of the controversy, is or is not living under an entirely new system of laws. Mr. Park, however, has at last decided the affair. Besides convicting Mr. H. of citing, as "the *final* number," the third title of the

second book, (seven titles of a fourth book having been printed before), he proves by unimpeachable testimony that the Code Napoleon is still in force in the Netherlands; — that it is not known when the new code will come into operation; and that many parts of the Code Civil are yet intended to be altered.

We give a part of Mr. Park's note on the topic.

In his reply to this (Mr. Cooper's, *on dit*) in the last number of the Jurist, Mr. Humphreys very naturally appeals to the formal conclusion of "the final number, 61," [it should be of each number] of the Code Civil as published in the *Journal Officiel des Pays-Bas*; "Mandons et ordonnons que la presente loi soit inserée ou Journal Officiel; et que nos ministères et autres autorités qu'elle concerne tiennent strictement la main à son execution." It might, perhaps, have in some degree shaken Mr. Humphreys' confidence in the conclusiveness of that form if he had also observed that the Art. 1<sup>re</sup> in the first number of the Code (*which concludes in the same words*) is as follows "A compter de l'époque où le présent Code Civil du Royaume des Pays-Bas sera exécutoire, toutes les lois civiles, les réglemens et statuts généraux et locaux ainsi que l'autorité de droit romain, cesseront d'avoir force de loi, dans les matières qui sont traitées et réglées par le Code Civil de Royaume des Pays-Bas." Mr. Humphreys would have found also on closer inspection that that which he cites as the final number, (as being the last published) is nothing more than the third title of the second book, and that in former numbers (51 to 57) seven titles of a fourth book had been given. It must be admitted however that the tendency of the "Mandons et ordonnons" is very deceitful, to say nothing of the testimony of Monseigneur Van Maanen.

How M. Van Maanen can have fallen into the mistake it is difficult to understand. I am enabled however on the authority of Baron Falck, the Ambassador from his Majesty the king of the Netherlands, of the Dutch Consul, and of Professor Holtius of Louvaine, who is now (Sept. 1828,) in London to assure the public that (with the exception of one title of the new Code respecting *rentes emphytéotiques* of which the immediate execution has been specially decreed) it is the Code Napoleon which is still in force throughout the Netherlands; — that it is not yet known when the new Codes will come into operation — that many parts of the Code Civil are yet intended to be altered, — and that their publication in the *Journal Officiel* is only "d'une manière provisoire;" which expression of Baron Falck's is explained to me by Professor Holtius in the following manner "La promulgation provisoire a pour objet de constater légalement l'existence de la loi, sans la rendre dès à présent exécutoire: on peut donc l'appeler provisoire, puisqu'il faudra un autre acte définitif pour fixer l'époque de l'exécution."—p. 114, 115.

Alas, alas, Mr. Humphreys !

The Spanish fleet you cannot see  
Because it is not yet in sight ;

and yet you have systematically avowed, not merely that this code *worked well* ; but that it contained the whole corpus of the laws of property, real and personal, in 518 moderate octavo pages ; that it formed a masterpiece of correct arrangement ; and that each expression seemed weighed as in a balance ! Your mistake was hinted at in terms as mild as it was possible to use ; and, when Mr. Cooper suggested that both in your conversation with M. Van Maanen, and in your criticism, you had mistaken the Belgic Code for the New Civil Code of the Netherlands, he suggested the only excuse that could bring you off without a total wreck of character ; but you thought proper to retort with acrimony : *you*, nine-tenths of whose claims are built on perversion, have dared to talk of perversion to *him* ; and you compose a defence for yourself, the shame of which will stick to you for life. Mr. Park has very nearly finished you : to his exposé we have only one addition to make, and *that* we give as an illustration of character. Besides the statement refuted above, you make the following appeal to authority :—

To these quotations I have little to add, but Mr. Cooper cannot contest the authority of Mr. Reddie, whose pamphlet he so strongly recommends to notice. That gentleman, after speaking with some approbation of the Dutch Code, as compared with that of the French, (but without showing the difference between them,) observes, that under the circumstances stated by him, “ it is satisfactory, but not surprising, to learn that the code works well, at all events better than the French code, till lately in force.” (\*)—*Jurist*, No. 4. 135.

(*Mr. Humphreys' reference*)—\* p. 40.

That Mr. C. cannot contest the authority of Dr. R. as to a particular point, after recommending his pamphlet to notice, is an odd assertion. We recommend Dr. R.'s pamphlet to notice, and yet are of opinion, that one charge of inconsistency brought by him against the code is not well founded ;<sup>1</sup> and we dispute his dictum as to the working of the code. because his only witness is Mr. Humphreys himself. We turn to p. 40. of Dr. R.'s pamphlet, as Mr. H. directs :—

<sup>1</sup> In quoting from Art. 524, of the Code, Dr. R. leaves out the words “ *per destination*,” which appear to obviate his objection. See the Pamphlet, p. 30.

"Under these circumstances, it is satisfactory and it is not surprising to learn that "the Code works well," at all events, better than the French Code till lately in force; but it is a little questionable if the authority adduced in support of this allegation can be received in all its latitude." \*

(Note by Dr. Reddie.)—"That of Monseigneur Van Maanen, one of the principal co-operators in the work. See Mr. Humphreys' Letter to Mr. Sugden, p. 48.

So—Dr. Reddie conceiving it impossible for you to blunder as you have blundered, repeats your statement with an expression of doubt, and you requote the quotation leaving out the doubt and the reference to yourself! The phrase "*works well*" occurs very often in this article: why dont you quote us?

We have done with Mr. Humphreys for the present; and who but an idiot would henceforth assume the accuracy of his statements, or take his citations upon trust? We should not regret the trouble, had we not been led away from Mr. Park, and it is now too late to make up for our wanderings; but one of his calculations is of such paramount interest, that we cannot resist the temptation of mentioning it:—

"Having requested Mr. Preston to furnish me with an average statement of the number of cases, long and short, he conceives himself to have answered per week in full practice, he has enabled me, by an examination of his opinion books at different periods of five years' distance, to satisfy myself that (including abstracts, which it would be difficult to distinguish in a cursory examination,) the average exceeds thirty. The written opinions given by him during thirty-three years' practice, including those on titles, constitute an hundred and twenty-four volumes quarto (MS.) of about four hundred and fifty pages each on an average. Of the cases on which these opinions were given he considers it a safe statement that those that went on to judicial litigation would not average three per cent. upon the gross number. Here, then, is a statistical proof, from individual practice, of the immense amount of the *silent* operation of the law in this country. Taking the cases alone at 40,000 for the thirty-three years, here are at least 38,000 cases intercepted in their course towards judicial litigation by a single individual."—p. 195, 196.

To this estimate we have one objection. It does not posi-



tively state that Messrs. Preston and Park were able to decide these cases by reference to authority ; and parties may consent to abide by an eminent counsel's opinion on account of the vagueness of the law. This objection can hardly have escaped Mr. Park ; and were he to re-write the passage, we incline to think he would feel himself justified in setting our scruples at rest, by leaving nothing to inference. The cases, moreover, submitted to first-rate conveyancers, are not of the petty description to admit of abandonment or compromise. The greatness of the stake counterbalances the risk, and very shadowy claims to landed property are often made the foundation of a suit. We therefore put forward the estimate as an invaluable testimony in favour of English law. We confidently challenge the lawyers of France to furnish the means of comparison ; and, notwithstanding the indiscriminate invective with which our law of real property is assailed, we do not hesitate to say, that "both as regards transactions among the living, and the return to the quick from the dead," it is far from "surpassing the grasp" of the practitioner, and presents "many features of a general interest fully capable of being moulded into a system."

(These modes of speech are Humphreys' every line,  
For God's sake, reader, take them not for mine.)<sup>2</sup>

<sup>1</sup> See the work, p. 2 and 3, either edition. Mr. H. is fond of using *features* metaphorically. Thus, in the celebrated passage about the code of the Netherlands, quoted above, he tells us that he feels warranted in vouching for the *working qualities* of its leading *features*. Here, however, the late Lord Londonderry had certainly the start of him, if the Whig Laureat is to be credited.

(As thou wouldst say, my guide and leader  
In these gay metaphoric fringes) ;  
I must embark into the feature,  
On which this question chiefly hinges.

*The Fudge Family*, p. 14.

Apropos of style, we are tempted to notice an ingenious criticism on the Foreign Quarterly Review, a publication we most particularly admire, though we should rejoice to see the law-department placed in better hands. The writer of Art. 4. No. 3. is pleased to speak of Mr. Cooper in the following terms : — The more recent author of some letters respecting the Court of Chancery, who has thought fit, for no reason that we are able to imagine, to disguise his sentiments in French words engrafted on English idiom, has contrived, in making a great display of extensive reading, French, German, Italian, to lose sight of the only useful object of study, and writes himself 'Anti-Trebonien,' with evidently very little consideration of the principles for or against which he conceives himself to contend, p. 109. note. This writer's incapacity we have exposed already (ante, p. 478. note), and we shall not

trouble ourselves to defend Mr. C. against the charge of making a display of French, German and Italian reading, knowing, as we do, that no man can perform a more acceptable service to the English public than by diffusing a knowledge of foreign writers on law and legislation.

Indeed, so impressed are we with the value of Mr. C.'s remarks on codification, that we regret exceedingly his not publishing them in English; but whether he has or has not succeeded in French composition, may be judged of from the following extract:—

“ Ces lettres, attribués à un avocat Français, traitent de la cour de la chancellerie d'Angleterre, de la chambre des pairs, comme tribunal d'appel, et de plusieurs points importants de la jurisprudence des trois royaumes. Si les détails nombreux et vraiment instructifs que ces lettres renferment sur la législation et sur l'organisation et le personnel du barreau Anglais peuvent faire croire qu'elles ne sont point l'œuvre d'une personne étrangère à la Grande-Bretagne; d'un autre côté, l'idiome dans lequel elles sont écrites et leur genre de style laissent peu de doutes sur leur origine Française.”—*Revue Encyclopédique*, tom. 4. p. 681. (for 1827). In his last publication, Mr. Cooper does not cite this criticism, though he has a note in defence of his style.

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Since the former part of this note was written, the sixth number of the Foreign Quarterly Review has been published, in which another article by the same writer appears. We were particularly struck with the following allusion, in the shape of a note very loosely connected with the text:

“ Great pains have been taken, at least on one side of the question, to raise this dispute, which we very much suspect is one of mere words, to the dignity of a serious controversy; and since these sheets were in the press, we have seen the announcement of a work dedicated to the exposure of “ The Humphreysian Code!!!” which we have moreover heard oracularly pronounced to be something quite conclusive in bar of all codes, past, present, and to come! Until we shall have read the book, we must beg leave to doubt the infallibility of the oracle,” p. 435.

Until he “ shall have read the book” the critic had better say nothing about it. What candour can be expected from one who thus endeavours to damn by anticipation? It is strange that the editor allowed the allusion; and stranger still that he admitted many parts of the article. Did he mistake the following for fine writing?—

“ But the seeds of resistance sown by the juryman will spring up and flourish in future juries. The great political end of the institution is, however, the admission which it affords to a direct participation in the administrative functions of government by the mass of the people, a benefit of incalculable importance which we, as Englishmen, ought to feel ashamed of estimating at any less magnitude than as it strikes the eyes of a foreigner, but which we may in some measure learn to appreciate, from the indisputable fact, that it can have existence under no form of government but that with which we ourselves are blessed of a LIMITED MONARCHY.” p. 463.

We are tempted to contrast this with a passage from Mr. Humphreys.—

“ Trial by jury, however strong a bulwark in some constitutions, does not necessarily accompany representative government, though equally proceeding with it from the principle of self-control.”—p. 2.

These codifiers are certainly original thinkers; and, for once, we agree with Mr. Humphreys. America is blessed with a representative government, though not, we believe, with a limited monarchy; and she might certainly have trial by jury, though we can just conceive her existing without it.

## DIGEST OF CASES.

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THE Common Law Digest comprises the last number of Barnwell and Cresswell ; the two last numbers of Manning and Ryland ; the common law cases in the last number of Younge and Jervis ; and two numbers (being all that have yet appeared) of Creswell's Insolvent Reports. We have exercised no principle of selection ; thinking it better to insert a few legal truisms, than deprive the practitioner of the advantage of knowing that he has before him every decision, in Banc, considered worth recording. The last number of Bingham was published after this digest was completed ; and we think it most advisable to wait for the coteremporaneous number of of Moore and Payne.

The Equity Digest comprises all the cases in the last number of Simons ; and all the Equity cases in the last number of Younge and Jervis. These are the only Equity reports of coteremporary decisions that have been printed since our last number.

A Digest of Haggard's Ecclesiastical Reports has been added. No Bankruptcy Reports have appeared since our first Number.

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## COMMON LAW.

### ACT OF PARLIAMENT.

1. By an act creating a dock company, it was enacted that all goods, &c. *landed or discharged* upon any of the quays, &c. of the company, should be charged the same rates of wharfage as are usually taken for goods, &c. *loaded or discharged* upon any quay or wharf in the port of London. Held, that the act gave the company no right to wharfage for goods shipped *off* their quays. Held, also that, the property in the quays, &c. being derived exclusively from the act, the company had no common law right to a remuneration for the use of them.—*Kingston upon Hull Dock v. La March*, 8 B & C. 42. S. C. 2 M. & R. 107.
2. The statute, 7. Geo. 3. c. 37. (reciting that it would remove many inconveniences if the ground and soil of the Thames was inclosed and embanked,) after regulating the mode of inclosure, &c. vests the ground and soil when inclosed and embanked in the owners of the adjoining wharfs or grounds, free from all taxes and assessments whatsoever. Held, that houses subsequently built upon such grounds were not liable to the poor rate.—*Rex v. London Gas Co.*, 8 B. & C. 54. S. C. 2 M. & R. 12.

3. An act imposed a pecuniary charge on all persons who inhabit, hold, possess or enjoy any land, house, shop, &c. in a ward; and provided that a certain number of inhabitants of the ward should be chosen collectors, and be bound to serve as such under a penalty named in the act. Held, that a person occupying a shop in, but residing out of the ward, was not bound to serve; and (per Bailey, J.) the term "inhabitant" may mean either occupier or resident; the latter is the proper sense where it is used to denote persons on whom a personal and not a pecuniary charge is to be imposed.—*Donne v. Martyr*, 8 B. & C. 62. S. C. 2 M. & R. 98.

### ADMINISTRATION.

The condition of the common administration bond being, 1st, to make and exhibit a new inventory: 2dly, to administer according to law: 3dly to make a true account of the administration: 4thly, to pay the residue to such persons as the judge of the court shall by decree or sentence direct according to the statute of distributions (22 & 23 Car. 2. c. 10.): 5thly, to deliver up the letters of administration in case any will shall appear. Held, that the condition is not broken by the administrators not having paid the residue to the next of kin, unless payment has been regularly decreed.—*Archbishop of Canterbury v. Tappen*, 8 B. & C. 161. S. C. 2 M. & R. 136.

### APPRENTICE.

An indenture binding an apprentice for seven years, to serve A. for three, and B. for four years of the time, and learn a different trade with each, is valid and requires but one stamp.—*Rex v. Inhabitants of Louth*, 8 B. & C. 247.

### ATTORNEY.

An attorney received from his client a sum of money, being the interest due on a mortgage, which it was his duty to transmit to the mortgagee. He neglected to do so, and subsequently became bankrupt, and duly obtained a certificate. The Court refused to interfere; holding that there was nothing in the case to justify them in depriving the attorney of the benefit of his certificate.—*Culliford v. Warren*, 8 B. & C. 220.

And see WARRANT OF ATTORNEY.

### BANKRUPT.

1. *A. fi. fa.* upon judgment by *nil dicit* was issued against the goods of the bankrupt, by virtue of which a seizure was made. Whilst the goods were in the sheriff's hands the bankrupt committed an act of bankruptcy, upon which a commission was sued out. The sheriff, subsequently, and with notice of the commission, sold the goods and paid over the proceeds to the creditor. Held, upon the construction of 6 Geo. 2. c. 16. s. 108., that the produce of the goods might be recovered in an action for money had and received against the sheriff by the assignees.—*Motley v. Buck*, 8 B. & C. 160. S. C. 3 M. & R. 68.

[N. B. In the marginal note to B. & C. it is made a *quære* whether the sheriff was justified in selling after notice; and in the marginal note of M. & R., whether an action of trover was maintainable against the sheriff. The court gave no opinion on either of these points.]

2. Trespass for false imprisonment against commissioners. The plaintiff was served in London on Monday evening at 5 o'clock, with a summons to appear before them at Norwich the following morning at ten. He told the person who served the summons that he had private business which would prevent him from attending, and requested that the commissioners might be informed of his situation. He was then asked if the Friday following would suit, and said that it would not. He did not object to the shortness of the notice, nor to the sufficiency of the sum tendered for expences. The person who served the summons transmitted intelligence of what had passed (and confirmed by affidavit) to the commissioners, who thereupon issued their warrant, under which the plaintiff was taken into custody and detained till his examination was closed. It was proved that four coaches left London for Norwich after five in the evening, and arrived there before ten in the morning. It being objected at the trial that private business was not a "lawful impediment" within 6 Geo. 4. c. 16. s. 33., the C. J. nonsuited the plaintiff; but a new trial was granted on the ground that the question, whether so short a notice was sufficient, should have been left to the jury; and that it was not incumbent on the plaintiff to take the objection when the summons was served. Held also, that it was necessary that information of the plaintiff's refusal should be given on oath.—*Grocock v. Cooper*, 8 B. & C. 211. S. C. 2 M. & R. 78.

[N. B. The Reports of this case vary. In M. & R. the Court are made to say—that both the reasonableness of the notice and the tender of the expences should have been left to the jury—in B. & C. that their opinion was not founded on the ground that the sum tendered was insufficient; but solely on the ground stated above.]

And see ATTORNEY; SET-OFF; PLEADING.

CHAPELRY. See PEW.

COLONIAL COURT. See FOREIGN JUDGMENT.

#### CONDITION.

1. A memorandum of a demise contained the following clause. "It is stipulated and conditioned that the said G. G. shall not underlet." Held that a condition was thereby created on breach of which ejectment was maintainable, though there was no clause of re-entry.—*Doe Dem. Henniken v. Watt*, 1 M. & R. 694.
2. A plaintiff recovering in the action is entitled to the costs of cross-examining witnesses examined in India by virtue of a mandamus obtained by the defendant. The statute, 13 Geo. 3. c. 63. s. 44., is silent as to costs.—*Whytt v. Macintosh*, 2 M. & R. 133.

## COURT OF REQUESTS.

A court of requests having exclusive jurisdiction over all debts not exceeding £5. with the exception of actions for the balance of accounts originally exceeding, though the balance be less than that sum. Held, that an action for the balance of an account originally exceeding, though the balance was less than that sum, might be brought in the superior courts.—*Carden v. Burford*, 2 M. & R. 170.<sup>1</sup>

## COVENANT.

A. & B. had been engaged in contracts with the navy board ; in some of which A. was solely interested as contractor ; in others, B. was solely interested as contractor : in some they were jointly interested as contractors. A., however, had been agent in B.'s contracts, and B. in A.'s ; and there was money due to each of them in respect of each class of contracts. Such being the relation between them, a deed of separation was entered into whereby all the debts, &c. were assigned to B., he covenanting to indemnify A., and A. covenanted that *for and notwithstanding any act done by him (A.)* it should be lawful for B. to receive the debts assigned, *without any let, suit interruption or denial of A. his executors or administrators, &c.* Held, that as it appeared to be the intention of the parties to close their accounts without a formal reckoning, the private as well as the partnership contracts were to be considered as included in the arrangement : that the right to receive the debts due in respect of A.'s private contracts, passed to B. ; and that a breach of the covenant was committed by the receipt by A.'s executor of certain monies due in respect of his testator's (A.'s) private contracts ; though it was contended that the words in *Italics* were to be taken strictly, and that no breach was committed by the act of the executor of A. ; but the Court held that the objection was obviated by the subsequent words "let, suit, &c. of A. his executors or administrators." The action was by B. against the executor of the executor of A.—*Belcher v. Sikes*, 8 B. & C. 185.

## DEVISE.

A. being seized in fee devised to his mother for her natural life only, after her death to his wife for her natural life only ; and from and after the decease of his mother and wife to the *surviving* children of B. & C. and their heirs for ever. Held that the term "surviving" referred to the death of the testator ; and that the estate vested in remainder in the then children of B. & C.—*Doe v. Prigg*, 8 B. & C. 231.

## DISTRESS,

Trover for two barges, distrained by the defendants on the Thames whilst lying between high and low water mark, and attached by ropes

<sup>1</sup> Our digest of this case varies slightly from the marginal note of the reporter ; but the judgment is literally nothing more than "Lord Tenterden, C. J. Upon all the evidence this action was brought for the balance of an account.—Rule discharged with costs."

to a wharf, in respect of which the rent was due. A special verdict stated that the exclusive use of the land between high and low water mark, as well when covered with water as dry, was demised as appurtenant to the wharf; but that the land itself between high and low water mark was not demised. Held, that if it was to be inferred from the finding that the exclusive use was appurtenant, it would be a mere easement or privilege out of which no rent could issue; and if the verdict meant that the land between high and low water mark was appurtenant to the wharf, it was tantamount to finding that one piece of land was appurtenant to another, which in point of law cannot be. (See Co. Lit. 121. b. note.) In no case, therefore, was the distress maintainable.—*Buzzard v. Capel*, 8 B. & C. 141.

### EJECTMENT.

1. A presentation being rendered void by having been made in consideration of a simoniacal bond to resign, an incumbent presented by the king, and properly inducted, may maintain ejectment against the clerk simoniacally presented. It was objected that *quare impedit* was the proper remedy; but it was answered that the church was vacant until the induction of the king's clerk, and that *quare impedit* was the proper remedy when a church is full.—*Doe v. Fletcher*, 8 B. & C. 25.
- 2 A judgment in ejectment was entered up for a messuage and tenement. Held ground of reversal on error.—*Doe v. Dyball*, 8 B. & C. 70.

### ESCAPE. See PLEADING.

### EVIDENCE.

1. An unstamped memorandum of the receipt of money may be used by a witness to refresh his memory, though he has no knowledge of the transaction but what he infers from thence. Thus, in an action against the assignees of a bankrupt for money received by him, the plaintiff's book was shown to the witness the (bankrupt) in which the memorandum with his initials appeared. These he recognized, and declared that from his initials being annexed, he had no doubt of his having received the money, though he remembered nothing of the transaction. It was objected that to admit the evidence was to make the memorandum operate as a receipt, and that it ought to have been stamped as such; but the objection was overruled.—*Maugham v. Hubbard*, 8 B. & C. 14. S. C. 2 M. & R. 5.
2. The period of 30 years, after which a will may be received in evidence without proof of execution, is to be computed, as in case of a deed, from the date; though it is proved that the testator died within that time and that one of the attesting witnesses is still living. Held also that after the lapse of a century, and no evidence to the contrary appearing, the death of a party without issue may be presumed. *Doe v. Wolley*, 8 B. & C. 22.
3. The mother of the pauper gave in evidence that, 24 years before, she

had received money from the parish officers to apprentice her son; that the indenture, when executed, was given by her to the wife of a market gardener, attending the market of the parish, to take to the overseers; and that the market gardener and his wife were both dead. Evidence was then given, that search had been made in the parish chest for the indenture, and that it was not to be found. Held that, it being the duty of the officers to place the indenture, if received, in the parish chest, the presumption was that it was lost, and that secondary evidence of the contents was, under the circumstances, admissible.—*The King v. Inhabitants of Stourbridge*, 8 B. & C. 96. S. C. 2 M. & R. 43.

### EXECUTION.

Case for a false return of *nulla bona*. The goods of H. were seized under a *fi. fa.* directed to the sheriff of London, in March; but by the connivance of the creditor, were suffered to remain unsold in the possession of an officer, H. being allowed to use them as before. In Sept. the new Sheriff came into office, and in Nov. a *fi. fa.* at the suit of the plaintiff in the present action was put into his hands, which he omitted to execute, on the ground that the goods were already in the hands of the law. Held that the goods were liable to the second execution, and that it was the duty of the new Sheriff to enquire into the circumstances. The plaintiff accordingly recovered, though subsequently to the false return he had taken the original defendant under a *ca. sa.* and proved the debt under his commission.—*Lovick v. Crowder and Kelly*, 8 B. & C. 132. S. C. 1 M. & R. 84.

FERRY. See PRESCRIPTION.

### FOREIGN JUDGMENT.

An action will lie upon the decree of a colonial court ordering payment of the balance of a partnership account, and it is sufficient if the claim was substantially made out, though the proceedings are, what in this country would be deemed irregular. It was objected that the proceeding in the present case was substantially an equitable one, and that, as an action would not lie on the decree of an English Court of Equity, *a fortiori* would not on the decree of a colonial court. But held, that as an English court of equity could enforce its own decrees, which a foreign court could not, the cases were distinguishable.—*Henley v. Soper*, 8 B. & B. 16. S. C. 1 M. & R. 163.

### HIGHWAY.

It must appear on the face of an order for stopping up the highway, that the order was made upon view. Therefore an order to the effect following, viz. "We the undersigned, two of his majesty's justices of the peace, having upon view found," or, it having appeared to us, &c. *Rez v. Justices of Worcestershire*, 8 B. & C. 254.

INHABITANT. See ACT OF PARLIAMENT, 3.



**INNKEEPER.**

An innkeeper, like a carrier, can only limit his liability by express agreement or notice. Therefore, where a package, part of a traveller's luggage, was placed by his desire in the commercial room of an inn from which it was stolen, the innkeeper was held liable, though it was proved to be the custom of the house to deposit all luggage in the bed-rooms of the guests.—*Richmond v. Smith*, 8 B. & C. 9.

**INSOLVENTS.**

1. The court will dismiss the petition of an insolvent (without remanding him for the purpose of obtaining the consent of three-fourths of his creditors) who has been discharged by this court within five years from the date of filing his petition, and who has contracted several debts by false representations.—*re J. Chaffer*, 1 Cressw. 1.
2. An insolvent receiving debts after his imprisonment, and before the adjudication, will not be allowed relief out of his estate.—*re J. Gilbert*, Id. 3.
3. Where the notice for hearing given by the insolvent, by advertisement in the country newspaper, was, by a mistake of the printer, stated to be for the 21st of October, instead of the 31st, the court refused to proceed to adjudication, and directed the insolvent to cause a fresh advertisement to be made.—*re E. Cooper*, Id. 4.
4. The court will not compel an attorney, who has been served with a subpoena to give evidence but not been paid his usual fee of one guinea, to be sworn as a witness.—*re Eliz. Parker*, Id. ib.
5. The wife of a creditor is not competent to give evidence in support of her husband's testimony.—Id. ibid.
6. Where the insolvent received money from a creditor for the purpose of taking up a bill which he (the insolvent) had accepted, and applied the same to another purpose, the court held it to be a fraudulent breach of trust.—*re G. C. Egler*, Id. 5.
7. The provisional assignee under a commission of bankrupt against an insolvent may apply for and receive assets out of the estate and effects of the insolvent, if the insolvent was declared a bankrupt within two months of his being heard on his petition, the assets of his estate having been before assigned to the provisional assignee of this court.—*re J. Tucker*, Id. 7.
8. The court will not appoint assignees before the hearing, unless some urgent necessity be shown for it.—*re T. Day*, Id. 8.
9. A creditor not named in the insolvent's schedule is not entitled to vote for the appointment of an assignee.—Id. ibid.
10. The insolvent, on coming up to be heard on his petition, was ordered to be removed from London to the gaol of Gloucester, under the stat. 7 Geo. 4. c. 57. s. 65. at the expence of his opposing creditors; after his arrival at Gloucester, the detaining creditor's bill was paid, and he was discharged without taking the benefit of the act; on an appli-

cation in this court for the dismissal of the petition and for books, papers, &c., which had been filed in this court, to be delivered up to him, it was held that the opposing creditors having neglected to lodge a detainer against the insolvent before his dismissal, were not entitled to be reimbursed the expences of removal to Gloucester; and the petition should be dismissed without imposing any terms on the insolvent.—*re W. Bruerton*, 1 Cressw. 9 & 31.

11. The petition stated that the insolvent had been discharged in 1824, instead of 1814; it was allowed to be amended, being rather against than in favour of the insolvent.—*re B. Treble*, Id. 11.
12. Insolvents under attachments for non-payment of monies may petition.—*re J. Philpot*, Id. 12.
13. The court allowed unclaimed dividends, remaining in the hands of the assignee, to be distributed rateably amongst the creditors named in the insolvent's schedule who had proved their debts, due notice of the dividend having been given by advertisement.—*re W. Yeates*, Id. ib.
14. When the affidavit for leave to file a petition is proved, on the hearing of the insolvent, to be false or substantially defective, the court will dismiss the petition.—*re R. B. Thornhill*, Id. 16.
15. Where an insolvent had been remanded to obtain the consent of three-fourths of his creditors (five years not having elapsed from the date of his first discharge), but had settled with his detaining creditors and gone out of custody, it was held that on a subsequent petition, after the expiration of five years from the date of his first discharge, he was entitled to his discharge without being again remanded to obtain such consent.—*re W. Castell*, Id. 20.
16. When an insolvent is twice remanded for the purpose of obtaining the consent of three-fourths of his creditors, if he omit to comply strictly with that order, his petition will be dismissed.—*re E. Gadderer*, Id. 21.
17. The first hearing of an insolvent's petition having been adjourned, in consequence of his being taken suddenly ill during his examination, he settled with his detaining creditor, and went out of custody without the adjudication of the court; on a subsequent day he obtained a rule absolute for the dismissal of his petition, and for the re-delivery of his books of accounts, which had been filed before the first hearing. On his coming up a second time, it appeared that he had assigned the books to a creditor; but the court ordered that they should be produced, together with the assignment, on pain of having his petition dismissed.—*re E. Hulme*, Id. 23.
18. If an insolvent, whose residence within the walls of the prison has been dispensed with on account of ill-health, goes out of the rules after filing his petition, his petition will be dismissed.—*re W. White*, Id. 27.

19. In a case of damages, in an action for criminal conversation, the court will give its judgment according to the verdict, and will not admit evidence to show that the damages awarded should have been reduced.—*re J. Marsh*, 1 Cressw. 28.
20. An insolvent having been once discharged, and having omitted to insert a debt in his former schedule, owing prior to such discharge, on coming up a second time, was remanded to obtain the consent of three-fourths of his creditors.—*re B. Rawlins*, Id. 32.
21. Where the insolvent is entitled to a share of the personalty of an intestate, but administration has not as yet been taken out, the court will not delay the discharge till the assignee has been put in possession.—*re F. Burner*, Id. 33.
22. Executors becoming possessed of property accruing to an insolvent after his discharge, were ordered to retain it; and sufficient case not being shown, one moiety thereof was directed to be transferred to the insolvent's assignees, under 1 Geo. 4. c. 119. s. 30.—*re H. Hewlett*, Id. 34.
23. In cases of slander, the court will regulate its judgment by the amount of damages.—*re J. Jackson*, Id. 37.
24. Where the opposing creditor's debt was contracted by the insolvent's wife during his absence at sea, but the order was not completed on his return, the question was, whether his allowing it to be completed was such an adoption of the debt as to deprive him of the benefit of the act, the value of the goods being so great that he could not have the probable means of paying for them; it was decided in the negative.—*re G. Wingham*, Id. 39.
25. The insolvent's balance-sheet commencing at the time of his commitment, instead of his arrest, is a ground for the dismissal of the petition.—*re W. Bear*, Id. 41.
26. An affidavit stating that all the insolvent's debts are contracted in one county, and that all the creditors resided there, was held sufficient ground for an order that the insolvent should be removed.—*re T. Twine*, Id. 42.
27. Notwithstanding a breach of trust be of such a nature as to expose the insolvent to a criminal prosecution, the court will order him to be imprisoned under the statute 7 Geo. 4. c. 57. s. 49. with liberty to the opposing creditor to discharge him.—*re W. Langley*, Id. 43.
28. If an insolvent wilfully puts his assignees to unnecessary expense, by instituting law-proceedings against them, (for acts done by them in the discharge of their duty,) with intent to consume his property and diminish the fund to be distributed to his creditors, the court will remand him until he obtains the consent of three-fourths of his creditors.—*re A. M'Beath*, Id. 45.
29. If an insolvent in confinement contracts a debt, and disguises or even keeps back the fact of his imprisonment, it is a fraudulent contracting of a debt.—*re F. H. Tolfrey*, Id. 48.

30. An opposing creditor, on application to the court to refer the insolvent's schedule and accounts to the proper officer of the court, is bound to prove the existence of that debt at the hearing, notice to that effect having been given him.—*re R. Winter*, 1 Cressw. 50.
31. Upon proof by the opposing creditor of his debt, as required by stat. 7 Geo. 4. c. 57. s. 43. he will be entitled to oppose, and the debt cannot be invalidated either by the statute of limitations, or upon the stamp act.—*Id. ibid.*
32. Where an insolvent after having given bail in two actions, made over the whole of his property by a bill of sale to his wife's trustee for the re-payment of trust-money advanced by the trustee to the insolvent, it was held that this was both a fraudulent preference, and a fraudulent making away with property within the meaning of the stat. 7 Geo. 4. c. 57. s. 48.—*re J. Turner*, *Id.* 54.
33. The last usual place of abode must be inserted in an insolvent's schedule.—*re W. Staves*, *Id.* 56.
34. The solicitor to the assignee of a bankrupt-creditor of the insolvent is not competent to consent to waive notice of the hearing of an insolvent's petition, although a delivery of notice to him is equivalent to personal service on the assignee.—*re J. B. M'Carthy*, *Id.* 56.
35. If an insolvent neglects to deliver up to the assignee of his estate, leases to which he is entitled, and is then discharged; the court upon his coming up a second time to take the benefit of the act will not discharge him until the leases are delivered up, they being the property of the assignee under the first assignment.—*re J. Cooper*, *Id.* 58.
36. Leave will be given to an insolvent to file a petition, notwithstanding he has been several years in custody, and during that time disposed of all his property; such permission not determining the merits of the case.—*re J. Ramsden*, *Id.* 59.
37. The 7th rule of court requiring an insolvent, on moving for leave to file a petition, to state to whom all monies have been paid, &c. since the arrest, means that the person must be identified, his trade and address specified in the affidavit, so that perjury may be assigned on the affidavit, if false.—*Id. ibid.*
38. Where an insolvent had hired a horse; and during the period of the hiring, proposed to give to the owner a bill as the price of the horse, which was not agreed to; but the bill was left, at the stables during the absence of the owner, and the horse was afterwards sold by the insolvent and the bill dishonoured, the transaction was held to be a fraud within the meaning of the act.—*re C. O. Bushman*, *Id.* 63.
39. On an application for an allowance under the stat. 7 Geo. 4. c. 57. s. 56. the notice must be served on the creditor, and not on his attorney.—*re Whaughley*, *Id.* 66.
40. Where an insolvent removed himself from custody in the country to London by a writ of *habeas corpus*, and went out on bail for two days, it was held that this did not take the case out of the 66th sec-

- tion of the act, the change of custody on the surrender being immaterial.—*re J. Bancroft*, 1 Cressw. 66.
41. If an executrix, being insolvent, inserts the debts of the testator in her schedule, they will be struck out.—*re Eliz. Smith*, Id. 69.
  42. So long as an insolvent's estate is vested in the provisional assignee, the court has the power of appointing assignees after he has discharged himself; but will not do so unless a very strong case is made out to induce them.—*re J. Bradbury*, Id. 71.
  43. The assignees of an insolvent's estate are bound to file an account prior to the declaration, or payment of a dividend.—*re A. Smith*, Id. 73.
  44. This court will not, under any circumstances, question the merits or propriety of a decision made in a superior court.—*re J. Marsh*, Id. 74.
  45. Lands and tenements are not within the meaning of the 6th rule of court.—*re J. Amott*, Id. 76.
  46. Notice of opposition to an insolvent by a wrong christian name, but altered when too late, to the right name, is bad notice.—*re W. Hatten*, Id. 77.
  47. A creditor has the right to apply for the removal of an insolvent without entering notice of opposition.—Id. *ibid*.
  48. An insolvent omitting to give a proper description of all his places of residence, where he may have contracted any of his debts, will be remanded.—*re G. Worster*, Id. 80; and *re R. E. Tompkins*, Id. 85.
  49. An opposing creditor whose debt does not amount to 20*l*. must first get execution before the adjudication can be carried into effect; but the court has the power of remanding the case to such a period as would enable the creditor to gain his object.—*re G. Eningblut*, Id. 81.
  50. In cases of insolvent publicans, the court requires the licences to be filed prior to the hearing.—*re J. Monk*, Id. 82.
  51. Creditors in making entries of opposition must adhere strictly to the rules on that subject laid down by the court; and if the entry is not made in the proper page and column, the creditor will not be allowed to oppose.—*re T. O. Higgins*, Id. 82.
  52. Obtaining goods without the probable means of paying for them, between the period of arrest and surrender is a fraudulent contracting of a debt.—*re J. Stockford*, Id. 87.
  53. Although an insolvent be unopposed, the court will, in cases of fraud, exercise the discretionary power vested in it by the act of parliament, and prolong the imprisonment of the party.—*re C. Lewis*, Id. 89.
  54. Where the insolvent obtained goods from his opposing creditor, without mentioning to him that he had that day been arrested, and the action settled by his bail, it was held to be a fraudulent contracting of a debt.—*re D. W. Bray*, Id. 89.

55. Where the insolvent, the day after his opposing creditor had threatened to arrest him unless part of the debt were immediately paid, sold all his property, and gave an unsatisfactory account of the proceeds, it was held to be a fraudulent making away with his property.—*re J. Jacklin*, 1 Cressw. 93.
56. An insolvent having been discharged within five years, is obliged to prove that his second insolvency has arisen from misfortune: on failure of such proof, the consent of three-fourths in number and value of his creditors, is required by the court.—*re J. Woods*, Id. 97.
57. An insolvent will not be discharged forthwith, who shall falsely file a blank estate paper, he being possessed of property beyond his expected articles, at the time of filing his petition.—*re T. Drakeford*, Id. 100.
58. Although the damages in an action for slander are small, the court will take into consideration the relative situation in life of the parties, and award its judgment accordingly.—*re J. Allen*, Id. 100.
59. The acceptance of a security from an insolvent, subsequent to the contracting of a debt with a knowledge of previous fraud, acts as a waiver of complaint.—*re F. Scotson*, Id. 102. and *re W. Streachen*, Id. 109.
60. A sequestration in Scotland, although similar to bankruptcy in England, not coming within the words of the act of parliament, need not be inserted in the petition.—*re W. Hutton*, Id. 104.
61. Where an insolvent, having represented to a creditor that he had received an order for a watch from a particular person, and requested the creditor to let him have some watches for the purpose of enabling the person to make a selection, promising to return them all, that the one chosen might be completed; and it appeared that the representation was false, and the watch was sold to some other person, and the price was not paid to the creditor, the court remanded the insolvent.—*re G. Ogston*, Id. 105.
62. The assignee of a bankrupt is not guilty of a breach of trust in neglecting to pay the costs of the solicitor under the commission.—*re R. L. Sheppard*, Id. 109.
63. Where the insolvent pleaded the general issue to an action on a bill of exchange, and afterwards brought a writ of error, it was held to be a vexatious defence.—*re T. Baker*, Id. 110.
64. An insolvent being arrested by process out of a court of local jurisdiction, removing himself by *habeas corpus cum causa* to London, has no *locus standi* in this court.—*re P. Rutter*, Id. 112.
65. In all cases of fraud by false representations, the court requires the evidence of the party complaining to prove that the credit was given, in consequence of such representations.—*re J. Corlass*, Id. 116.
66. An insolvent who on being sued as one of bail on a writ of *scire facias*, files a false plea, thereby delaying the opposing creditor, and

- putting him to unnecessary expence, will be remanded.—*re T. Loving*, 1 Cressw. 117.
67. Were the insolvent represented falsely to creditors with whom he had had many dealings, that he kept an account with a banker, on whom he gave a check for money lent, and that he had married a woman of fortune, who was prevented by illness from coming to town to transfer stock, and thereby induced his creditors to lend several sums of money, he was remanded for twelve months.—*re H. H. Moore*. Id. 119.
68. Where an uncertificated bankrupt, in consideration of having his certificate granted, is induced to give bills of exchange to some of his creditors for debts due before the commission of bankrupt, (they not having proved their debts under that commission) thereby renewing the original debts; such bankrupt on coming up to be heard on his petition in this court, has a *locus standi* under the stat. 7 Geo. 4. c. 57. s. 64., as against a holder of the bills, who is privy to the circumstances under which they were given.—*re J. Abraham*, Id. 123.
69. A submission to arbitration with a subsequent award is a waiver of any fraud.—*re W. Ashley*, Id. 125.
70. Where it appeared that an insolvent, on coming up the second time, had retained money which he had received as clerk, and ought to have paid over to his employers, it was held that as this debt had not been contracted by misfortune, he must obtain the consent of three-fourths of his creditors.—*re J. Phippen*, Id. 126.
71. An omission in an insolvent's petition of his having been bankrupt, even twenty years prior to his insolvency, is fatal.—*re C. Wall*, Id. 127. and *re J. Bentley*, Id. 134.
72. Where the insolvent, being an attorney, pleaded the general issue to an action for a debt which he acknowledged to be due, the defence was held to be vexatious.—*re G. D. Giles*, Id. 127.
67. Where the insolvent pleaded the general issue to a debt which he acknowledged, and also paid money to a relative after an offer, on his part, of a composition with his creditors, he was remanded.—*re T. C. Gould*, Id. 130.
73. Where it appears from an insolvent's schedule, that all his debts and credits are in the country, the court will order the removal of the insolvent at his own expence.—*re E. Sigley*, Id. 134.
74. Where the greater part of an insolvent's creditors reside in the country, the court on a motion unsupported by affidavits, will order his removal at the expence of the opposing creditor.—*re S. Paine*, Id. 135.
75. An insolvent giving a bill on a banker with whom he has no account, held guilty of contracting a debt by means of false representations.—*re J. Steer*, Id. 136.
76. The transposition of the insolvent's Christian and surname in his petition, is not a sufficient ground for dismissing it.—*re Aaron Wolff*, Id. 138.

77. A married woman, who has obtained a verdict against an insolvent, before coverture, may give evidence against him, notwithstanding proceedings were had by *scire facias*, to make the husband a party to charge the defendant in execution.—*re Aaron Wolff*, 1 Cressw. 138.
78. In a case of gross fraud, the court will dismiss an insolvent's petition, instead of delaying his discharge for a definite period.—*Id. ibid.*
79. Where an insolvent described himself as agent to a merchant, whereas he was agent to several persons of different trades, jointly engaged in a particular transaction, the case was adjourned for the insolvent to amend, and re-advertise.—*re T. B. Londer*, *Id.* 142.
80. In cases of fraudulent breach of trust by confidential servants, the court will act with more severity than in ordinary cases.—*re R. Davis*, *Id.* 143.
81. Where a removal by *habeas corpus* was sued out by a relative of the insolvent without her knowledge, procurement, or request, the order for hearing was dismissed, it being held as a removal by *habeas corpus* sued out on *her behalf* within the meaning of the 66th section of the act.—*re E. Dunford*, *Id.* 144.
82. In cases of fraud, the court will, on the evidence of the insolvent alone, exercise the discretionary power vested in it by the 47th section of the act, notwithstanding the opposing creditor is not present to substantiate his case.—*re S. Tanswell*, *Id.* 147.
83. Notice of opposition entered in the country, is not sufficient to entitle a creditor to oppose in London.—*re G. Samwell for J. Adams* *Id.* 148.
84. A prior insolvency, though it took place seventeen years before, must be stated in the petition.—*re J. Bradford*, *Id.* 149.
85. The court, under the statute 1 Geo. 4. c. 119. s. 13. has no power to permit the assignees of an insolvent to compound a suit in equity.—*re J. Truss*, *Id.* 150.
86. An insolvent arrested in the country, removes himself by *habeas corpus* to the King's Bench prison, where another detainer is lodged against him, the plaintiffs in the original action discharge him, and lodge another detainer against him for another debt: Held, that this was a removal by *habeas corpus*, within the meaning of the 66th section of the act, as, from the first arrest, the insolvent was never out of custody, and the subsequent detainers depended on the prior arrest.—*re W. A. Carden*, *Id.* 152.
87. If an insolvent has been bankrupt more than once, that must be mentioned in his petition, notwithstanding the first commission issued during his minority.—*re J. Frances*, *Id.* 155.
88. A reference of "all matters in dispute" is conclusive, so as to prevent an opposing creditor from going into a question of fraud.—*re J. P. Taylor*, *Id.* 156.
89. Where an insolvent sets forth his name incorrectly, the court will dismiss his petition.—*re T. A. Forster*, *Id.* 157.



90. The counsel for an opposing creditor may examine an insolvent as to the disposition of his property, for the purpose of establishing a case of fraud, notwithstanding such property would be affected by a prior bankruptcy of the insolvent.—*re W. Mill*, 1 Cressw. 157.
91. An order for an allowance under the 56th section of the act, may be examined, if it appears that such order was obtained by false representations.—*re J. Marsh*, Id. 158.
92. Where an insolvent, ordered goods, to be paid for on delivery; and then refused to pay for them, or redeliver them, it was held that he had obtained them by fraudulent means.—*re J. Suter*, Id. 159.
93. If an insolvent, having two Christian names, has been discharged under a prior insolvency by only one of those names, abandoning the other, the court will dismiss the order for hearing, and require a re-advertisement of both names.—*re T. J. Newman*, Id. 161.
94. The disposal of property, that would benefit an insolvent's creditors, between the period of arrest and render to prison, is a ground for the dismissal of his petition.—*re J. Tuekey*, Id. 162.
95. Where an insolvent made over a waggon and horses to a creditor, (who already had bills as a security for his debt,) but left his own name on the waggon, and continued to work them, as he stated, for the benefit of the creditor, the court considered this to be a fraudulent disposal of property.—*re J. Presley*, Id. 163.
96. Where all an insolvent's creditors reside in the country, the court upon affidavit will order his removal.—*re E. Nokes*, Id. 164.
97. When a case has been fully gone into, the court will not allow counsel to appear for another creditor, who has not entered notice of opposition.—*re H. Blore*, Id. 165.
98. If an insolvent has possession of property belonging to another, and exercises a controul over it for a long period of time, such possession constitutes a reputed ownership; and it must be delivered up for the benefit of the creditors.—*re J. Fensham*, Id. 165.
99. The court at any time, prior to adjudication, will adjourn a case if there is found any error in an insolvent's description.—*re J. Cooper*, Id. 168.
100. Where, in consequence of the misdescription of the insolvent's residence, the case is adjourned, the insolvent may insist upon the opposing creditor's going on with his case.—*re H. M. Say*, Id. 168.
101. A person, who borrows money for the purpose of carrying on business, on becoming insolvent, has no right to give up his effects to the lender, in preference to his other creditors; should he do so, it will be construed to be a fraudulent making away of property.—*re J. Johncock*, Id. 170.

#### INSURANCE.

The ship was chartered to London, and until she had been moored 24 hours in safety. She arrived at Deptford, and applied to be admitted into the King's Dock, but the master was informed that no order had arrived, and that, if it had, the ship could not be brought in on ac-

count of the ice. She remained accordingly moored off a king's ship for nine days, and was then driven on the shore by the ice, and lost. The jury were charged to find for the plaintiff, if they thought the ship was detained by the ice; and for the defendant, if they thought the captain waited merely for the order. They found for the plaintiff, and the court refused to disturb the verdict.—*Samuel v. Royal Exchange Assurance Company*, 8 B. & C. 119.

### LEGACY DUTY.

Stock was bequeathed to executors in trust to pay the interest to B. for life, remainder after B.'s death to his surviving children. The executors, upon A.'s death, and before Aug. 31, 1815, transferred the stock into their own names, but B. not dying till 1826, they still continued possessed of it in trust. Held, that the transfer did not amount to a payment, delivery, retainer, satisfaction or discharge of the legacy before Aug. 31, 1815, and was therefore liable to the duty under the 55 G. 3. c. 184.—*Attorney General v. Wood*, 2 Y. & J. 290.

### LIBEL.

1. Information for a libel. The defendant was found guilty, and spoke in person in mitigation of punishment; and having gone into much irrelevant matter, was advised by the court to argue upon the ground of his having been in error in making the charge; saying they could not allow him to urge the truth of the charge then, after having been put to fair proof of it at the trial. — *Rex v. Bradley*, 2 M. & R. 152.<sup>1</sup>
2. Written slander, tending to bring the plaintiff into public hatred and contempt, is actionable; as when an overseer is charged with oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon a particular tradesman.—*Woodward v. Dowsing*, 2 M. & R. 74.

**LIMITATIONS.** See STATUTE OF LIMITATIONS.

### LUNATIC.

An order on parish officers to pay a certain sum due for the past, and also a certain weekly sum for the future, maintenance of a pauper lunatic confined in an asylum is bad, so far as respects its retrospective operation, though good as to the rest.—*Rex v. Inh. Maulden*, 8 B. & C. 78. S. C., 2 M. & R. 146.

<sup>1</sup> We have given this report almost verbatim, except the sentence, which is also reported. The marginal note is, "The defendant in an information for a libel may prove the truth of the matters alleged to be false and libellous. *Semle*."

The point is new: "To deny the libel is of no signification, for oath stands against oath, and the information goes that the fact may be ascertained. It would be an absurdity, if a man were allowed to justify when an information is prayed against him, and should not be allowed to justify when the information is brought to trial." Holt's Law of Libel, 260.

**MANDAMUS.**

The Court granted a mandamus to the ordinary to permit a person to inspect and take extracts from the book of the registrar, touching a living within the diocese, the next presentation of which was claimed both by the ordinary and the person applying for the writ.—*Rex v. Bp. of Ely*, 8 B. & C. 112. S. C. under the name of *Finch v. Bp. of Ely*, 2 M. & R. 127.

**MARRIAGE.**

The stat. 4 Geo. 4. c. 75. s. 16. requiring the consent of parents to the marriage of a minor is directory merely; and a marriage was held valid though the man was a minor, and his father then living did not consent. The wife gains her husband's settlement, though the marriage is brought about by fraud on the part of parish officers. *Rex v. Inh. Birmingham*, 8 B. & C. 29.

**MONEY HAD AND RECEIVED.**

The part owner of a vessel contracted with his partner for the purchase of his moiety and paid the price. He was thenceforward allowed the exclusive possession of the vessel, and received, and deposited as a security for a loan to himself, the defendant's title deeds; but could not procure a bill of sale of the moiety. Held, that as the plaintiff had derived a benefit, and the defendant suffered an inconvenience from the part execution of the contract, it could not be rescinded so as to allow of the plaintiff's recovering the price paid in an action for money had and received.—*Beed v. Blandford*, 2 Y. & J. 278.

**ORDER.** See HIGHWAY.

**OVERSEER.**

An overseer may re-enter and resume possession of a house (the property of the parish) during the absence from home of the pauper by whom it had been occupied; and is not bound to proceed under 50 G. 3. c. 12. s. 24. which gives authority to two justices to eject paupers unlawfully intruding and refusing to quit after notice. Per Lord Tenterden: The statute was not intended to take away a right which the owner of property had at common law to enter and take possession; if it could be done peaceably.<sup>1</sup>—*Wildbor v. Rainsforth*, 8 B. & C. 4.

**PARTIES.**

1. Case against owners of a vessel for loss of goods shipped by plaintiff. By an agreement between the master and the owner, it was agreed (amongst other things) that the master should take the said ship into his service for a certain time, and pay freight for the same at a certain rate, but that the owner should have an agent on board, who, on deviation by the master, was authorised to supersede him; and that bills taken by the master in payment of homeward freight, should be

<sup>1</sup> See No. No. I. Article. 7.

transmitted to the trustees for the owner and master. Held, that the agreement being in substance but an appointment of a master upon an undertaking by him that the ship should earn a certain sum, and all beyond that sum to be for his own benefit, the owner was still liable to the shipper, though the shipper was aware of the agreement.—*Colvin v. Newberry*, 8 B. & C. 166. S. C. 2 M. & R. 47.

[N. B. The agreement contained many particulars which might be supposed in some measure to influence the construction, but which it is impossible to digest or abstract.]

2. The owner of post horses, let to take a gentleman's carriage to Epson, and as usual under the guidance of the owner's servants, is liable for an injury occasioned by their negligent driving.—*Smith v. Lawrence*, 2 M. & R. 1.

[The judges all expressed their adherence to their opinions delivered in *Laugher v. Pointer*, (8 D. & R. 556. 5 B. & C. 547.), in which the court were equally divided on the question whether the hirer of job horses let for the day was liable. Lord Tenterden, C. J. declared the cases not in substance distinguishable; but the other judges thought them distinguishable.]

#### PEWS.

The perpetual curate of an augmented chapelry within a vicarage may maintain trespass for pulling down a pew in the chapel, even against the vicar and chapelwarden.—*Jones v. Ellis*, 2 Y. & J. 265.

#### PLEADING.

1. An information for unlawfully soliciting a custom-house officer to neglect his duty, stated merely that A. was "a person employed in the service of the customs of our said lord the king; and that as such person so employed as aforesaid it was his duty to seize," &c. Held insufficient; for the duty in question was imposed "on officers in the army, navy, or marines duly authorised, &c. and officers of customs or excise, or any person having authority from the commissioners, &c. and it did not appear that A. came within either description. *Rex v. Everett*, 8 B. & C. 114. S. C. 1 M. & R. 35.
2. In an action against the marshal of the King's Bench for an escape, the declaration stated mutual bonds of submission by the plaintiff and A., the award, &c. and the subsequent committal of A. for contempt in not performing it. Held, that the plaintiff was bound to prove the execution of both of the bonds of submission, though it might have been otherwise had he alleged and proved the order for the attachment; but that proof of such order, the order not being alleged in the declaration, was not sufficient.—*Brazier v. Jones*, 8 B. & C. 124. S. C. 2 M. & R. 88.

[N. B. In Bar. & Cr. it is stated that A. (then being in custody of the defendant) was brought by *hab. corp.* before a judge at chambers, and committed by him for the contempt, and that it was urged in argu-

- ment, that the commitment by a judge at chambers was illegal. In M. & R. the commitment is stated to have been made by the court.]
3. Plea, that at the time when the causes of action accrued, plaintiff and defendant were domiciled in Ireland; and that afterwards a commission of bankrupt issued against plaintiff at Dublin, and that plaintiff was in due manner found, adjudged, and declared a bankrupt. On demurrer, the plea was held bad, for not stating directly that the plaintiff *was* a bankrupt.—*Gwinness v. Carroll*, 2 M. & R. 132.
  4. An indictment for perjury stated that the defendant gave information that A. *being a brewer, &c.* did neglect, &c. The information, not containing the words in Italics, the variance was held fatal.—*Rex v. Leech*, 2 M. & R. 119.
  5. Declaration stated that in consideration that the plaintiff at the request of the defendant *would* consent to suspend proceedings against A. defendant undertook, &c. to pay A.'s debt. A memorandum, signed by the defendant to the effect following was proved: "Mr. R. P. (the plaintiff) having, at my instance and request, consented to suspend proceedings, &c. I do hereby undertake," &c. It was contended at the trial that the proof was of an executed consideration, whereas the consideration set out in the declaration was executory. The objection was over-ruled by the judge; and the rule to enter a nonsuit was discharged by the court; some stress however being laid on the effect of the verdict.—*Payne v. Wilson*, 1 M. & R. 708.

And see PARTIES; POOR; LUNATIC; OVERSEER; SETTLEMENT.

#### POOR RATE.

A rate cannot be quashed on appeal for grounds not stated in the notice of appeal, even though the objection appear on the face of the rate, (41 Geo. 3. c. 23. s. 4.) In the present case the property, in respect of which certain persons were rated, was not specified in the rate? and it was held that the rate might have been quashed for the omission, had it been stated in the notice.—*Rex v. Inh. of Bromyard*, 8 B. & C. 240.

And see ACT OF PARLIAMENT.

#### PRACTICE.

1. Judgment having been obtained against husband and wife for a debt contracted by the wife when sole, both were taken in execution. The husband, having been discharged under the insolvent act, a judge's order was obtained for the discharge of the wife; but the court held the wife to be personally liable, on its being proved by affidavit that she derived a separate income from property vested in the trustees. (The income was 8*l.* per annum, and the debt 100*l.*)—*Sparkes v. Bell*, 8 B. & C. 1. S. C. 2 M. & R. 124.

[N. B. In the marginal note to M. & R. no mention is made of the separate estate which appears to us the *gist* of the case.]

2. Personal service of the notice of executing a writ of inquiry on the defendant is bad. It should be on the attorney or clerk in court. — *Brookes v. Till*, 2 Y. & J. 276. In this case the defendant here is the attorney
3. An affidavit of the service of a declaration in ejectment may be sworn before the attorney in the cause. *Doe, dem. Cooper v. Roe*, 2 Y. & J. 284. 1144 P. 11
4. An action having been brought in London by a plaintiff residing in the country, a summons is taken out in London to stay the proceedings in the action, upon payment of a sum less than the demand, together with the costs incurred, in full satisfaction of the plaintiff's claim. This the plaintiff's agent in London refuses to accept; and in the mean time, it becomes necessary for the defendant to take some step in the cause, in order to prevent the plaintiff from obtaining interlocutory judgment. Accordingly he pleads and pays into court the sum, &c. originally offered. By this time the agent in London has received instructions from his principal, and elects to take the money out of court, rather than incur additional expense. Under such circumstances, and no fraud or vexatious proceeding appearing on the part of the plaintiff, he is entitled to costs up to the time of taking the money out of court. — *Haworth v. Holgate* 2 Y. & J. 257. In which the plaintiff brought the action
5. The rule requiring a term's notice of proceeding, does not extend to a motion for judgment as in case of a nonsuit. — *Hockin v. Reece*, 2 Y. & J. 275.

### **PRESCRIPTION.**

Case for disturbing a ferry. Plaintiff proved a user of thirty-five years: the defendant proved interruptions at various times, and a variation of the toll within living memory. The judge having left the question to the jury, who found for the plaintiff, the court refused to disturb the verdict. — *Trotter v. Harris*, 2 Y. & J. 285.

**REGISTER.** See **MANDAMUS**.

**REMAINDER.** See **DEVISE**.

**SEQUESTRATOR.** See **USE and OCCUPATION**.

### **SESSIONS.**

Justices at quarter sessions were equally divided on the question whether an order of removal should be quashed, one of those who voted for the respondents being the removing justice and a rated inhabitant of the parish from which the pauper was removed. The chairman announced that the court was equally divided, and an order for adjourning the appeal was then made. A *certiorari*, with a view to quash the order, was applied for, on the ground that the sessions ought to have quashed the order, as there was a majority of legal votes for so doing; but the K. B. refused the application, saying that they could not interfere in a matter in which the sessions had not exceeded their jurisdiction. But, per Lord Tenterden, C. J. "We do not in

any degree intend to sanction a magistrate's voting in any case in which he is interested." *Rex v. Just. of Monmouthshire*, 8 B. & C. 137. S. C. by the name of *Rex v. Inh. of Uske*, 2 M. & R. 172.

#### SET-OFF.

1. Plaintiff gave defendant a bond conditioned for the payment of an annuity which the defendant had bound himself to pay to a third person and for the indemnification of the defendant against the same. A sum of money becoming due to the annuitant, Held, that the defendant might set off the amount against the plaintiff, without proving that the defendant had been obliged to pay it. And, per Cur. "The question must be treated as if it had arisen in an action on the bond, in which case the obligor would have been bound to prove performance of the condition by payment of the annuity.—*Penny v. Foy*, 8 B. & C. 11.
2. Where a mutual credit has been constituted, so as to give a party the right of set-off, it is not in the power of the other to put an end to that mutual credit so as to take away that right. Thus, in an action by the assignees of bankrupt (the drawer) against the defendant as acceptor of certain bills, it appeared that after the bills in question were drawn, and before the bankruptcy, they were indorsed by the bankrupt to A. who, when they became due, applied to the acceptor for payment, and, on being refused, paid himself out of money belonging to the bankrupt in his (A.'s) hands at the time of the bankruptcy, and returned the bills to the assignees. The defendant banked with the bankrupt, and at the time there was a balance in his favour. Held that he was entitled to set off the amount in the present action; for the defendant gave the bankrupt credit by leaving a balance in his hands, and the bankrupt gave the defendant credit as acceptor of the bills, so that there was a mutual credit within the meaning of the 5 G. 2. c. 30. (See 6 Geo. 4. c. 16. s. 56.) *Bolland v. Nash*, 8 B. & C. 105.

#### SETTLEMENT.

1. To satisfy the 6 G. 4. c. 57. (which declares that no settlement shall be gained by hiring a tenement unless the rent for the same to the amount of 10l. be actually paid for the term of one whole year) the whole year's rent *whatever its amount*, must be paid. *Rex v. Inh. of Ashley Hay*, 8 B. & C. 27. S. C. 2 M. & R. 21.
2. A settlement is gained by hiring and holding a dwelling house for a year, though part of it (the cellar) be underlet during part of that time; (the 59 Geo. 3. c. 50. requiring that to gain a settlement by renting a tenement, it must consist of a separate and distinct dwelling house or building, &c. of both, &c. and that such house or building shall be *held*, and the land *occupied*, for the term of one whole year.) In the present case the house was held, though not occupied.—*Rex v. Great Bolton*, 8 B. & C. 71.

3. Service under an apprenticeship, brought about by fraud, confers a settlement, if the fraud be not on the part of the parish officers. In the present case, the master of the apprentice had been falsely represented as a butcher. — *Rex v. Inhabitants of Great Sheepy*, 8 B. & C. 74.
4. Where it is the intention of the parties to a contract that the pauper should serve as an apprentice, and the contract turns out defective as a contract of apprenticeship, it cannot be looked on as a hiring, so as to give a settlement by hiring and service. Thus, where the uncle of the pauper suggested that instead of going out to service, it was better for the pauper to come and learn his (the uncle's) trade, and he accordingly hired the pauper from his mother to learn the trade, upon an agreement that he should do other work as well, and lodge at his father's house; but that the uncle should find part of his food and clothing. The pauper served for five years accordingly, but no indenture was actually drawn up; though at one time it was in contemplation to execute an indenture to exempt him from the militia. Under these circumstances, it was held that no settlement was gained by the contract and service. — *Rex v. Inhabitants of Coombe*, 8 B. & C. 82. S. C. 2 M. & R. 30.
5. The master of an apprentice, at the expiration of a few months of the apprenticeship, not having work for him, sent him with his own consent to work for his (the master's) sister, on a farm occupied by her in another parish. On his arrival she asked him if he was willing to work for his meat and drink; which accordingly he did for two years, and served her two more for money wages. No assignment of the indenture was made; but the master exercised no controul over the pauper, though on one occasion he furnished him with shoes, and once also employed a surgeon to attend him. Held, first, that no settlement was gained by the apprenticeship because there was not a service under it, the service with the master's sister being under the contract of hiring; and, secondly, that none was gained by the hiring because there was a putting away of the apprentice within the meaning of the 56 Geo. 3. c. 139. s. 9. which requires the consent of two justices to the transfer or putting away of an apprentice. — *Rex v. Inhabitants of Skipton*. — 8 B. & C. 88.
6. A settlement is gained by hiring and holding a house for a year, and paying a rent of £10. though during the year, the pauper becomes chargeable, and is sent to another parish by an order of removal. In the present case he returned the same day, and continued to reside till the end of the year. — *Rex v. Inhabitants of Barham*, 8 B. & C. 99.
7. A pauper hired land situate in the parish of H. of a tenant from year to year, at the yearly rent of £8 16s. (being the rent paid by the tenant from year to year), and 3s. per week in addition. No time was specified, but he occupied the land for three years and paid the rent; and during such occupation resided and slept in the parish up-



wards of forty days and nights, though not for a year. Held, that the requisites of the 50 Geo. 3. c. 50. had been complied with, and that a settlement in H. was acquired by the pauper.—*Rex v. Wainfleet All Saints*, 8 B. & C. 227.

8. A settlement is gained by a party, hiring and occupying a tenement and paying rent for a year, though a third person is surety for the rent.—*Rex v. Inhabitants of Kegworth*, 2 M. & R. 28.
9. A verbal agreement entered into by a master, to set his apprentice at liberty and give up the indenture upon being paid a certain sum of money, does not put an end to the apprenticeship so as to fix the settlement of the apprentice in the place where he slept last before making the agreement.—*Rex v. Inhabitants of Warden*, 2 M. & R. 24.

And see MARRIAGE: EVIDENCE.

STAKEHOLDER. See WAGER.

### STAMP.

1. A promissory note for £11 payable to A. B. on demand, is within the first class of promissory notes mentioned in 55 Geo. 3. c. 84. Sched. Part I., and require a stamp of 2s.—*Keates v. Whieldon*, 8 B. & C. 7.
2. In an action for the wrong disposal of a certificate of a ship's registry, by the owners against parties with whom it was deposited as a security. Held, that a letter from one of the owners, sent with the certificate and stating the terms on which it was deposited, was not admissible in evidence to prove the terms of the deposit, without a stamp.—*Bowen v. Fox*, 2 M. & R. 167.
3. An attorney employed to recover the amount of a bill of exchange, wrote a letter acknowledging the receipt of it, and stating that he held it as attorney to recover the value, or arrange the matter. Held, that the acknowledgement was admissible in evidence without a stamp, as it was neither an agreement nor contract within the meaning of the stamp laws, but a mere acknowledgment of the duty he had undertaken to perform.—*Langdon v. Wilson*, 2 M. & R. 10.
4. An agreement for the sale of a ship, in which it was stipulated, that part of the price should be secured by mortgage of the ship, that the vendor should procure the ship to be chartered on a voyage, and that the earnings on the voyage should be paid as part of the price, &c. requires no stamp, notwithstanding these collateral stipulations; it being substantially an agreement for the sale of goods.—*Meering v. Duke*, 2 M. & R. 121.

And see EVIDENCE.

### STATUTE OF LIMITATIONS.

A payment by one of two joint and several makers of a promissory note takes it out of the statute as against the other, though only a surety,

and though the payment was made without his privity.— *Burleigh v. Scott*, 8 B. C. 36. S. C. 2 M. & R. 93.

#### SURRENDER.

A. being the yearly tenant of B., requested him to accept, as his under-tenant in A.'s stead, a person whom A. at the time knew to be insolvent. B. not suspecting the insolvency, accepted the person so proposed by A., but was not paid the rent. Held that the fraud vitiated the implied surrender, and that A. was still liable for the rent.— *Bruce v. Ruler*, 2 M. & R. 3.

#### TRESPASS.

The case of *Lucas v. Nochells*, reported in 4 Bing. 729. & 1 M. & P. 793. and digested ante, No. I. p. 400, was confirmed in the Exchequer Chamber, 2 Y. & J. 304.

#### USE AND OCCUPATION.

A. demised to B. for a term, during which a sequestration issued out of chancery against A.; B. on being applied to by the sequestrators signed an unstamped paper to the effect that he thereby attorned, and became tenant to the sequestrators to hold for such time, such rent and upon such terms as might be subsequently agreed upon between himself and the sequestrators. Held, that the sequestrators could not maintain use and occupation against B. the instrument being, in point of law, neither an attornment nor a surrender, which sequestrators are not entitled to take; and, that if the paper was an agreement, it was void for want of a stamp.— *Cornish v. Searall*, 1 M. & R. 703.

#### WAGER.

A. and B. laid a wager on the event of a boxing match, and deposited their stakes. The battle was fought, and, a dispute arising, the match was referred to an umpire, who decided against A. He, however, refused to abide by the decision, claimed the whole money deposited, and threatened the stakeholder (the defendant) with an action in case of refusal. The stakeholder, notwithstanding the threat, paid the money to B., in accordance with the umpire's decision. Held, that A.'s claim to the whole was a valid claim as to the moiety deposited by himself, that he had a right to rescind the contract at any time before its actual completion by payment over, even after the event was decided; and that the stakeholder, having paid over the money after notice, was liable to A. for his deposit.— *Hastletow v. Jackson*, 8 B. & C. 221.

#### WALES.

A new trial in a Welsh cause cannot be had on the ground of the verdict's being against evidence, where the damages are below twenty pounds.— *Beavan v. Jones*, 2 Y. & J. 264.

#### WARRANT OF ATTORNEY,

Rule nisi to set aside a warrant of attorney. The party on whose behalf it was obtained had gained a verdict against A., but, before execution

could be had, judgment was entered up at the suit of B. on the warrant of attorney in question, and the goods of A. were seized by virtue of it. The application was made on the ground, that the warrant of attorney (really given but three days before signing judgment, though dated four months before) was without consideration, and given for the purpose of defrauding the applicant. Held, that the court had full power to interfere in such a case; but, on the recommendation of the court, the validity of the warrant of attorney was referred to the master, the rule being enlarged until his report should be made.—*Harrod v. Benton*, 8 B. & C. 217. S. C. 2 M. & R. 130.

#### WITNESS.

Customary tenants are incompetent, on the ground of interest, to prove a custom for customary tenants to take timber for repairs within the manor.—*Le Fleming v. Simpson*, 2 M. & R. 169.

And see **BANKRUPT**.

### EQUITY.

**ABBEY.** See **TITHES**, 3.

**ACCOUNTS.** See **PRACTICE**, 6.

**ALLEGATIONS.** See **DEFENDANT**.

**AMENDMENT.** See **PRACTICE**, 1.

**ANSWER.** See **DEFENDANT: PRACTICE**, 3—6.

#### ARBITRATION.

On a general reference by three partners of all matters in difference to arbitration, the arbitrators found the partnership capital to be, on the day of the dissolution, in merchandize and good debts, of a given amount, including a debt due from A., one of the partners; and that there were some dubious debts. They then ascertained the amount of the debts due from the partnership, and found the gross value of the stock, which including the debts due from A., they awarded to be divisible between the other partners B. and C. They next found the dubious debts to be divisible as received between the three partners: and they awarded that A. should give security for the payment of his debt by instalments; and directed B. to receive the outstanding debts and effects, and to pay all debts owing by the partnership, of which accounts were to be stated periodically; and on the balance of receipts, special credit was to be given for A.'s share against his debt, and the remainder was to be divided between B. and C.; and any balance of payments was to be borne in the same proportions. The award was acted on by all parties; but B. subsequently received some debts which were omitted in the accounts laid before the arbitrators, and on which their award

proceeded; and he also received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A. against his co-partners,—Held that he was entitled, notwithstanding the reference was of all matters in difference, to an account of the good debts received beyond the amount estimated by the arbitrators; and to an account of the receipts in respect of dubious debts; and that any over receipt, in respect of good debts, ought to follow the directions of the award with respect to the dubious debts.—*Spencer v. Spencer*, 2 Y. & J. 249.

**ASSETS.** See JUDGMENT; EXECUTOR.

### **BANKRUPT.**

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff, for monies levied under an execution on a judgment by *nil dicit*.—*Mitchell v. Nott*, 1 Sim. 497.

[The late bankrupt act was intended to facilitate the administration of bankrupts' estates, not to vary the rights of the creditors and assignees under particular circumstances.—Per. V. C. 499. S. C.]

See PRACTICE, 9. STATUTE, 3.

**COPYRIGHT.** See PRACTICE, 8.

### **CROWN.**

Contemporaneous documents, proceedings in various causes, and parol testimony may be used in order to explain, but not to contradict, a grant from the crown.—*Governors of Lutton School v. Scarlet*, 2 Y. & J. 330.

See TITHES, 3. MONASTERIES.

**DAYS.** See PRACTICE, 7.

**DEBTS.** See JUDGMENT; LEGACY; MORTGAGE.

### **DEFENDANT.**

The court will not compel a defendant to answer allegations which may subject him to penalties. This protection extends not only to the question which may tend to criminate him directly; but to every link in chain of proof. Hence if there is a reasonable probability that the defendant may be indicted for a fraud imputed to him by the bill, he is not compellable to answer the allegation of that fraud.—*Maccullum v. Turton*, 2 Y. & J. 183.

See INJUNCTION; PRACTICE, 3.

**DEMURRER.** See PRACTICE, 7.

**DEPOSITION.** See PRACTICE, 5.

### **DEVISE.**

There is no analogy between a farm and West India plantation: and *semble* that a devise of the latter will pass the stock, implements, &c. thereon.—*Lushington v. Sewell*, 1 Sim. 480.

**ENDOWMENT.** See **TITHES**, 2.

**EXECUTOR.**

1. If an executor admits that all the testator's debts, &c. have been paid, the court will, on motion, order the income of a balance paid in by the executor, to be paid to the person entitled to the residue.—*Dando v. Dando*, 1 Sim. 510.
2. An executor admits asset at his peril. S. C. 511.

**GARNISHEE.** See **JUDGMENT**.

**GRANT.** See **CROWN**; **MONASTERY**.

**INFANTS.** See **MAINTENANCE**.

**INJUNCTION.**

Injunction may be granted to restrain the disclosure of secrets come to the defendant's knowledge in the course of a confidential employment.—*Evitt v. Price*, 1 Sim. 483.

See **PRACTICE**, 4.

**JOINT INTEREST.** See **LEGACY**, 2.

**JUDGMENT.**

A judgment in the Lord Mayor's court, obtained against the garnishee, does not rank as a judgment debt in the administration of the debtor's assets.—*Holt v. Murray*, 1 Sim. 485.

**LEGACY.**

1. Where a testator directs a legatee to be answerable for certain debts, an usurious debt must be deducted from the legacy, if the testator appears to have considered such debt as due.—*Stanton v. Knight*, 1 Sim. 482.
2. When a residuum is given to "the residuary legatees jointly," the legatees may take equally in point of quantity, but not a joint estate, if such appears to be the testator's meaning.—*Lushington v. Sewell*, 1 Sim. 435.

**LETTERS PATENT.** See **TITHES**, 1.

**MAINTENANCE.**

Devise to A. for life, remainder to his children as tenants in common in tail, with cross remainders between them, and remainders over. A., having 7 children, became bankrupt, and the lands were purchased under a local act of parliament, and the value of the children's interest was assessed by a jury without reference to the value of A.'s estate for life, or the subsequent contingent remainders; and the amount was paid into the bank in the name of the accountant general. On a petition by the infant children of A. for maintenance, &c. the court directed the fund to be laid out by the accountant general in the purchase of bank annuities, and the costs to be paid out of the first dividends; but it refused to order the dividends to be paid for the maintenance of the petitioners, as there were limitations to children who might be born thereafter.—*Whitehead ex parte*, 2 Y. & J. 243.

**MODUS.**

1. Moduses of 1*l*d. for every cow calving and being milked within the year ending at Easter, in lieu of the tithe of milk and calf of every such cow; of 1*l*d. for every cow not calving, but being milked within the year ending at Easter, in lieu of the tithe of milk of such cow; of 4*d*. for every colt foaled; of 3*d*. for every lamb; of 1*l*d. for every garden in lieu of the tithes of the produce of such gardens, &c. These payments were very ancient, and all the evidence in the causes tended to support them. Held good moduses, but issues offered.—*Governors of Lucton School v. Scarlet*, 2 Y. & J. 330.
2. When a bill is filed for tithes in kind, and the defendants do not admit the plaintiff's tithe, but set up moduses in lieu of the tithes to the person entitled to the tithes, and the court on the hearing considers the plaintiff's title made out, but directs issues to try the moduses, and plaintiffs decline to try those issues, the court will not direct an account of what is due in respect of the moduses with costs as against the defendants. But the court declined to lay down any general rule on the subject.—S. C. 2 Y. & J. 370.

**MONASTERIES.** See **TITHES**, 3.

The minister's accounts and the royal grants are, when they so state, usually considered sufficient evidence that certain premises were parts of a dissolved monastery.—*Governors of Lucton School v. Scarlet*, 1 Y. & J. 330.

**MORTGAGE.**

If an estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old debt and one contracted by himself, and fixes a new day of payment, he makes himself liable to both debts, notwithstanding he exempts his person and his property, except what is comprised in the new mortgage, from liability in respect of the same debts.—*Lushington v. Sewell*, 1 Sim. 435.

And there is no equity for separating the aggregate debt, and throwing any part of it on the estate which descended.—S. C. 478.

**MOTION.** See **PRACTICE**, 4.; **EXECUTOR**.**ORDER.** See **PRACTICE**, 8.**PARTNERSHIP.** See **ARBITRATION**,**PATENT.** See **PRACTICE**, 8.**PLANTATION.** See **DEVISE**.**PRACTICE.**

1. A bill may be amended by adding plaintiffs, notwithstanding the defendants have answered it.—*Hickens v. Congreve*, 1 Sim. 500.
2. The court cannot act on a person who is not a party on the record, unless he has come in and done some act, which subjects him to the jurisdiction of the court.—Per V. C. in *Lord v. Lord*, 1 Sim. 503.

3. Where a defendant omits through his solicitor's neglect, to put a good defence on the record in the original answer, leave may be given him, after replication, to file a supplemental answer. But the defendant must pay the costs caused by, and incident to, such answer.—*Jackson v. Parish*, 1 Sim. 505.
4. Motion to extend the common injunction granted, when the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one.—*Munnings v. Adamson*, 1 Sim. 519.
5. Where, after a decree, a witness is examined before the examiner, the publication of his deposition is passed by order of the court.—*Handley v. Billinge*, 1 Sim. 511.
6. Where the usual decree for accounts against a personal representative has been taken on motion, the master ought to require the vouchers to be produced, though the answer is not replied to.—*Davenport v. Davenport*, 1 Sim. 512.
7. The eight days within which a demurrer must be entered with the registrar are eight *office* days.—*Bullock v. Edington*, 1 Sim. 481.
8. In cases of invasion of patent or copyright, where the main object of the suit is answered when an injunction is obtained, a bill may, under the circumstances of the case, be restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause, and though the plaintiff had acquiesced in the order.—*Barfield v. Nicholson*, 1 Sim. 494.
9. Where there are two plaintiffs and one only of them becomes bankrupt, the bill may be dismissed upon the usual motion.—*Caddick v. Mason*, 1 Sim. 502.

#### PURCHASE.

1. A. purchased for B., but without authority, an estate sold under a decree. B. died without adopting the purchase. The order *nisi* was nevertheless obtained. The court refused to order B.'s executors to pay the purchase-money; and on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale.—*Lord v. Lord*, 1 Sim. 503.
2. If the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it, unless a suit be instituted by the heir.—S. C.
3. An estate was deteriorated, pending a suit for specific performance, and that fact was found by an issue; the purchaser was allowed the amount out of his purchase money which he had paid into court under an order, with interest at 4 per cent. from the time of such overpayment.—*Ferguson v. Tadman*; *Ruck v. Tadman*, 1 Sim. 530.

RECORD. See PRACTICE, 2, 3.

RECTORY. See TITHES, 1.

REGISTRAR. See PRACTICE, 7.

REMAINDERS. See MAINTENANCE.

RESIDUE. See EXECUTOR.

SOLICITOR. See PRACTICE, 3.

## STATUTE.

1. The recitals in the disabling statute, 13 Eliz. c. 10. do not limit the subsequent enactment to cases in which the mischief, by the alienation, is done to the personal interest of the successor of the alienor; for the legislature intended to apply the prohibition to the case of persons who were seised, either as mere trustees, or in a great measure as trustees, and, among others, to the master or guardian of an hospital. *Dean and Chapter of York v. Middleborough*, 2 Y. & J. 196.
2. It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import, in order to include cases within the same mischief.—S. C. 196.
3. When an act of parliament gives a right, it means to give also a legal remedy, and not to put the party to the extraordinary remedy of a court of equity.—Per V. C. in *Mitchell v. Nott*, 1 Sim. 499. See BANKRUPT.

SUPPLEMENTAL ANSWERS. See PRACTICE, 3.

## TITHES.

1. By letters patent 19 Jac. 1. a dean and chapter were seised in fee of a rectory for the support, &c. of a grammar school. In 1712 a deed of covenant was entered into between the dean and chapter, their lessee of the rectory, and the lord of a manor within the rectory, whereby the lord granted a perpetual rent-charge to the amount of the composition out of his estates, and in lieu of the tithes thereof; and this rent was received for upwards of a century. On a bill filed by the dean and chapter for the tithes of the manor, they were held entitled; the deed of covenant being void under the disabling statutes.—*Dean and Chapter of York v. Middleborough*, 2 Y. & J. 196.
2. In a suit by the vicar, where the endowment is lost, and it appears from the evidence that the rector has not received any small tithes, but that the vicar has received all the small tithes which have been rendered, the Court infers in favour of the vicar that the endowment conferred upon him, by a general expression, all small tithes whatsoever, carrying, not only such small tithes as were then actually received, but such as were at that time neglected, or came afterwards into existence by the improvements in husbandry. But where the vicar never has received, or been entitled to receive, the whole of the small tithes, then it cannot be so readily presumed that the endowment contained a gift to him in those general terms.—*Willis v. Farker and others*, 1 Y. & J. 217.

If a certain tithe has been uniformly received by the vicar, and never by the rector or any portioner, that fact ascertains that the endowment bestowed the tithe upon him. S. C. 227.



3. On the dissolution of monasteries, the possessions of an abbey came to the crown, which subsequently granted in fee all the tithes yearly renewing in, &c. with all their right, &c. Held that the Crown being *in loco rectoris*, such titles must mean the rectoral, or all except such as had been withdrawn by an endowment for the minister.—*Governors of Lucton School v. Scarlet*, 2 Y. & J. 330.
4. It is now settled that the mere naked non-payment of tithes will not support the defence of a conveyance or release.—S. C. 368.

And see *Modus*.

#### TRUST.

1. After a bequest to one of his next of kin, with a reason for giving nothing to the others, testator gave the residue to his wife, "recommending to her, and not doubting that she would consider his near relations as he would have done if he had survived her." Held, that there was no trust for the next of kin, but that the wife took the residue absolutely.—*Salé v. More*, 1 Sim. 534.

The current of decisions has of late years been against converting the legatee into a trustee. *Ibid.* 540.

2. Testator, after giving his real and personal estate to his wife absolutely, said that "he had so given the same to her unfettered and unlimited, in full confidence, and with the firmest persuasion that in the future disposition and distribution thereof, she will distinguish the heirs of my late father by choosing and bequeathing the whole of my said estate together and entire to such of my said father's heirs as she may think best deserves her preference." Held, that no trust was created. In the Lords, between *H. A. Meredith and J. Calcraft*, appellants; and *G. H. W. Heneage and others*, respondents. 1 Sim. 542.

The question whether a trust is created in cases of this kind is purely matter of intention to be collected from the words of the instrument. Per C. Baron, *ibid.* 550.

In all cases wherein such a trust has been created, its objects have been defined; but there is considerable difficulty in saying who are the persons described as the heirs of the testator's father. Per Lords Eldon and Redesdale, *Ibid.* 565.

3. A trust created by will to purchase land to be added and closely entailed to testator's family estate in the possession of T. B., testator declaring that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B. or his nearest relative in the male line; how to be executed, see *Woolmore v. Burrows*, 1 Sim. 512.

It often happens that the court is called on to explain a meaning, and execute a purpose, which the testator himself could not have explained in their detail; and the court is then driven to give such directions as it conceives nearest to a probable and rational purpose in testator's mind.—S. C. 525.

TRUSTEE. See TRUST; STATUTE, 1.

VICAR. See TITHES, 2.

VOUCHERS. See PRACTICE, 6.

WILL. See LEGACY.

WITNESS. See PRACTICE, 5.

#### USURY.

The statutes against usury preclude the remedy merely; and when a party goes into equity to be relieved against usury, the court refuses its assistance unless he will consent to pay what is really due.—*In Stanton v. Knight*, 1 Sim. 482.

And see LEGACY, 1.

### CASES IN THE ECCLESIASTICAL COURTS.

THE following is a Digest of Cases argued and determined at Doctors Commons in Easter Term, 1828, and contained in Vol. I. part 2. of Dr. Haggard's Reports, in the Ecclesiastical Courts.

N. B. These Reports should be cited as 1 Haggard E. R. to distinguish them from the Reports in the Consistory Court of London, by the same gentleman.

#### ADMINISTRATION.

1. Administration *durante minoritate* of children in the East Indies decreed to the uncle resident in Ireland, he giving security; the next of kin being upwards of 80, and also resident in Ireland.—*In the goods of John Ewing*, p. 381.
2. Administration *durante minoritate* formerly granted to the mother, having ceased by the minor's death, and the mother having thereby become joint residuary legatee with another minor, administration *de bonis non* decreed to her; one executor having renounced, and the other who was abroad being cited.—*Akens v. Dupuy*, p. 473.
3. A court of competent jurisdiction having granted probate of an informal paper to a widow as universal legatee without security, the Prerogative Court would not decree administration with the paper annexed without giving security.—*In the goods of Lieutenant Colonel Reid*, p. 474.
4. Administration with a will annexed, in which was no executor or residuary legatee, decreed to two legatees the daughters of the next of kin, who was 90 years of age, and incapable.—*In the goods of William Hinckley*, p. 477.

5. When administration *de bonis non* with a will annexed, in which is no executor, will be granted to a legatee, there being a residuary legatee.—*Pickering v. Pickering*, p. 480.
6. One executor having renounced, and the other being a lunatic administration will not be granted to the residuary legatee without security.—*In the goods of J. Hardstone*, p. 487.

#### COSTS. See MARRIAGE.

A suit by the wife against the husband having abated by the wife's death, her costs not directed to be paid by the husband on the petition of her proctor.—*Cheale v. Cheale*, p. 374.

#### LEGATEE.

Legatee who has been paid his legacy, how he may be a competent witness.—*Cooper v. Derriennic*, p. 482.

#### MARRIAGE.

1. A marriage solemnized clandestinely between a person of weak and deranged mind, and the daughter of his trustee and solicitor (who had great influence over him, and by whom he was treated as of unsound mind) pronounced null and void: the daughter was condemned in costs.—*Countess of Portsmouth v. the Earl of Portsmouth on appeal*, p. 355.
2. In respect to Lord Portsmouth's unsoundness of mind, the case set up was of a mixed nature; not absolute idiocy, but weakness of understanding; not continued insanity, but delusions and irrationality on particular subjects.—*Ibid.* p. 360.

#### PROBATE.

1. The deceased, supposing his will, appointing his wife sole executrix, and universal legatee for life, to be lost, made in Peru a nuncupative will, (not in conformity with the statute of frauds,) with a general revocatory clause, and appointing two executors, and his wife universal legatee absolutely. The executors renounced, and she took the probate of that will in Peru. The former will being found (of which fact he was ignorant at the time of his death) probate thereof, at the wife's prayer, granted to her.—*In the goods of Richard Moresby*, p. 378.
2. In decreeing probate the Court inclined to follow the grant of the Court of Probate where the party was domiciled.—*Larpen v. Sindry* p. 382.
3. The deceased having, between giving instructions for, and the execution of, his will, delivered to his solicitor a letter of testamentary import to be put with his will; probate thereof decreed as, together with the formal instrument, containing the last will of the deceased.—*In the goods of John Dunn*, p. 488.
4. Probate of the will of a married woman, a native of, and domiciled in, Spain, granted according to the law of Spain, to one of her sons as executor, on affidavits as to the law of Spain, and the identity of the parties.—*In the goods of Donna Maria de Vera Maraver*, p. 498.

## PROBATE IN COMMON FORM.

1. Not granted of a mere memorandum of doubtful construction where minors are concerned.—*In the goods of James Gibbs*, p. 376.
2. Not granted of a confused paper written *in extremis* on a mere affidavit of capacity and final intention, where the interest of minors is involved.—*In the goods of Hugh Ross*, p. 471.
3. Granted of a paper having the attestation clause in the plural number, and only one witness and the date of the year written on an erasure, though one of the next of kin would not consent.—*In the goods of Thomas Vanhagen*, p. 478.
4. Granted of two papers (one unfinished) on consent being given, and on affidavits that they were intended to operate.—*In the goods of Charles Broderip*, p. 485.

## WILL.

1. Mere evidence of execution of a will and codicil by a person of weak and inert mind, appointing his attorney and agent sole executor, and almost universal legatee of a large property, not sufficient. The instructions for the will having been given to the solicitor, who prepared and attested it, by, and in the handwriting of, the executor's father (also the deceased's co-agent and attorney); and the codicil having been prepared exclusively for his own benefit by the executor, in whose house the deceased was living apart from his family; and there being other circumstances strongly inferring fraud and circumvention.—*Ingram v. Wyatt*, p. 384.
2. The presumption of law, that pencil alterations are deliberative, may be strengthened by circumstances; such as, that the paper was originally carefully drawn up, and shews the deceased to have been a very precise man, while the alterations are incomplete and inaccurate, rendering the sense imperfect and the meaning doubtful.—*Edwards v. Astley*, p. 490.
3. A testator, having, ten years before his death when in perfect health, executed a will and subsequently a codicil conformable to his ascertained affections; and two years and a half before his death, after a paralytic stroke, producing at least great *bodily* infirmity, having executed a second codicil materially departing from those instruments, and six months before his death a third codicil, revoking the second, and reverting to the former disposition,—probate of the will first and third codicils granted; there being no satisfactory proof of a change in his affections, and the evidence of volition and capacity being at least as strong in support of the third, as of the second codicil.—*King v. Farley*, p. 502.

livered as of course at the time of declaring? and should not the same rule apply to pleas of set-off? and would it be advantageous, where the set-off exceeds the demand, to allow the defendant to recover the balance if he gives notice of his intention so to do?

16. In your opinion, should the non-joinder of a contractor be the subject of a plea in abatement under the present restrictions, which treat such plea as a dilatory one? Or should such plea be treated as a fair plea in bar, and pleaded in the same time, and without affidavit, with this restriction, that it should not be allowed at all, unless the defendant at the time of pleading procures an appearance to be entered for the parties who he insists ought to be joined? And in that case would it be right that the plaintiff should be at liberty to amend his declaration by inserting the other names, but still be permitted to take judgment against the original defendant, if he proves his case against him, but fails against the added defendants?

17. In general, do you think it would be advantageous that the plaintiff should not be nonsuited for joining too many defendants in contract as well as tort, but should pay costs in all forms of action to any defendant against whom he fails? And what, in your opinion, should be the consequence of joining too many plaintiffs as well in actions of contract as of tort?

18. Do you think it would be convenient that payment of money into court should be stated on the record? Do you think that the power of paying money into court should be extended to all cases? or if not to all, to all except actions for injuries to the person or reputation, or any and what others? And would it be advantageous in order to lessen the expence in proving damages, to allow the defendant in those cases in which he might have paid money into court, to annex to his plea whatever it may be, an offer that the damages, if any be recoverable, should be taken at a given sum, which offer the plaintiff may accept or not; if accepted, then that the offer and acceptance should be annexed to the record, and should be conclusive as to the amount of the verdict; if not accepted, then that it should not be annexed to the record or stated to the jury, but be produced to the proper officer upon taxation of costs, who should allow the costs of proving the damages to either party, according as the jury find more or less than the sum offered?

19. Would it be desirable that actions of replevin should be brought in the superior courts in the first instance, the mode of proceeding in replevying remaining as at present? Have you any amendment to propose with respect to proceedings in prohibition? Might not the suggestion be dispensed with, and the affidavit in support of the motion be sufficient? Do you think that debt should be for an annuity of freehold instead of a writ of annuity? And do any other alterations in the forms of actions appear to you to be advisable?

20. In what cases do you think the venue should be local? And in transitory actions, how and under what circumstances should the defendant be at liberty to change the venue? Does it appear to you that any and what alteration is required in the present law and practice relative to change of venue?

21. Is there any use in retaining the present form of protestation, if a provision is made that parties shall no longer be concluded in a subsequent action as to facts averred and not traversed in a former action?

22. Would it not be desirable in actions of trespass to allow a defendant to jus-

tify under rights of way, &c. alleging possession only of the property in respect of which the right is claimed? And in replevin, would it be desirable to allow a similar form of avowry as to fee farm rents and rent charges, as given by 11 Geo. 2. c. 19., respecting rents within that statute? Would it be desirable in actions of covenant to allow a plaintiff to state generally an assignment of the reversion to himself? And generally, wherever derivative title is alleged, that the party should not be bound to deduce it step by step on the record, such deduction not forming in general any part of the merits of the case?

23. In cases where it appears that there are mutual accounts between the parties in a cause consisting of several items on each side, would it be desirable that the judge who tries the cause should have power to order the matter of account to be referred to arbitration, subject to any and what regulations, and giving the parties greater facilities of revising the decisions than they now have in cases of arbitrators chosen by themselves? Are you of opinion that such power might be safely and beneficially given to the court upon motion at any and what stage of the proceedings prior to the trial, and under what circumstances? Would it not be desirable, in order to render proceedings by reference in this and other cases more effectual, to give to arbitrators under a submission by rule or order of court, or a judge's order, the power of compelling the attendance of witnesses, and of examining witnesses abroad?

24. To prevent false or vexatious pleading, would it be desirable that the plaintiff should be entitled, at his own costs, to call on the defendant to verify his plea by affidavit, stating that he believes the plea to be true, the defendant being at liberty to apply to a judge for leave under special circumstances to retain his plea without such affidavit, as for instance, where a verdict may be necessary for the defendant's indemnity in an action against a third person? Should there be any distinction between negative and affirmative pleas?

25. To prevent sham demurrers, would it be desirable that no demurrer should be received without a certificate of counsel, that he is of opinion there is reasonable ground of demurrer?

26. In cases where bills of interpleader are now allowed by courts of equity, would it in your opinion be desirable to give the court in which the action is pending a power to make such order as may be just for the purpose, instead of the parties being compelled to go into a court of equity? In what way would you recommend this to be carried into effect?

27. Would it not be desirable, in order to obtain the benefit of a discovery, without having recourse to a court of equity, that the parties in a cause should be examined upon oath, either personally or by interrogatories? At what stage of the proceedings should this be done, and before whom, and what regulations would you suggest for the purpose of carrying this measure into effect?

28. Would there be any inconvenience in giving a court of law power, without the consent of parties, to issue a commission for examining witnesses who are abroad or going abroad, or unable to travel or in prison?

29. Will there be any inconvenience, in your opinion, in allowing one party in a cause to give notice to the other of his intention to offer in evidence any written document, specifying the same, and appointing a time and place for the inspection thereof, and in providing that in case such document should not be admitted, the

costs of proving the same, if proved, should be paid by the party refusing to admit the same, whatever be the result of the cause ?

30. In your opinion, might the present forms of real actions, with any and what exceptions, be safely and advantageously abolished, and the action of ejectment newly modelled so as to enable a plaintiff to recover either the seizure or the possession of the property claimed, according to the circumstances of the case, and so that the real claimant should be plaintiff, claiming title under different persons, as the nominal plaintiff now does, but without the fictions of lease, entry, and ouster ? Should the plaintiff in such action be obliged to state his title specially in the declaration ? and the defendant to plead specially to the same, or not ? Do you think that any and what inconveniences would arise from such special form of pleading as applied to an action of ejectment ? Does any and what amendment occur to you with respect to the pleadings and proceedings, in quare impedit and dower.

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#### QUERIES AS TO THE WELCH JUDICATURE.

1. Whether you have been much acquainted with the practice of the courts of Great Sessions in Wales ?

2. Whether you think it desirable or not desirable that the Principality of Wales should be included in the circuits of the English judges ?

3. Whether you think it desirable or not that suits in the Principality of Wales should be commenced in the courts of Westminster Hall ?

4. What are the principal conveniences and inconveniences attending the present judicature of the Great Sessions in Wales ?

5. What are the comparative expences of conducting a suit at law for goods sold and delivered in the courts of Great Sessions in Wales, and in the court of King's Bench by bill for a cause of action arising in Staffordshire or any other English county, not being a county palatine, and tried there ?

6. What are the difficulties or facilities of including the principality of Wales, together with the county of Chester, in the circuits of the judges of Westminster Hall ?

7. If you think this object desirable and practicable, what arrangement would you suggest for the purpose of forming a seventh circuit ?

8. What alterations in the present circuits of England and Wales do you think necessary or expedient for the purpose of carrying that object into effect ?

9. What do you believe to be the prevailing wish upon this subject among intelligent persons resident in the Principality of Wales, whether professional or unprofessional, and not interested in the existing establishment ?

10. If you are sufficiently acquainted with the county of Chester to answer similar inquiries respecting the court of Great Sessions in that county, be pleased to favour the commissioners with your opinion thereon.

**QUERIES ON THE REGULATION OF THE COURTS, AND THE DISPATCH OF BUSINESS.**

1. Are there any causes of a permanent kind, and connected with the general constitution of the common Law Courts of Westminster Hall, which tend to a disproportion among them in the division of such business as it is in the option of suitors to carry to which court they please?

2. In a general point of view, how far do you think that the state of public or professional opinion as to the comparative competency of the judges or the bar in the respective courts, at any given period, has a tendency to affect the proportion of business among them?

3. Does any disproportion of business actually exist among them? how long within your observation has it existed, and in what manner and degree, and has it of late years, and since what period increased?

4. Is any of the three courts at the present period, without sufficient and adequate employment, and is any of them overcharged with business, and to what extent?

5. Have you any information to give with respect to the present state of the arrears in the business of the King's Bench, or in any of the courts, whether in banc or at nisi prius? and in what particular kinds or branches of business do those arrears principally exist, and to what causes are they attributable?

6. In proportion to the pressure on the Court of King's Bench, have increased efforts been made by its judges for the dispatch of business? and what new arrangements have been made of late years for that purpose, and with what effect? Since the introduction of those arrangements, have the arrears of business diminished or increased, and in particular, what is your opinion of the present method of disposing of the arrears of term business by three judges out of term, and of nisi prius business by extra sittings?

7. Would any arrangement that should require the Court of King's Bench still farther to extend the periods of its labour be consistent, in your opinion, with the degree of leisure and repose which ought to be allowed to its judges, and practitioners?

8. Do you think that any arrangements whatever would effectually enable that court to discharge its business free from arrear, unless some means were devised by which an increased proportion of the general business of the country should hereafter be carried to the other courts?

9. Do you think that if by any means the efficiency of the other courts were increased, the three courts, with their present number of judges, and without an unreasonable degree of exertion, would be adequate to the satisfactory dispatch of the business of the country?

10. What means can you suggest for bringing an increased proportion of the ge-



neral business of the country to the Common Pleas and to the Exchequer, or for dispatch of business in the King's Bench ?

11. What, in your opinion, would be the effect of taking away from the suitor the option of his court, and distributing his business equally or according to a certain ratio among the courts ; and in what practical mode could that principle be conveniently carried into effect ?

12. Do you think it desirable that barristers not having the degree of serjeants should be allowed to practice in the Common Pleas before the judges in banc, and with any and what qualification ? and that attorneys in general should be admissible to the practice of the Exchequer, or that either of these alterations should take place ? and what reasons can you suggest for or against either alteration ?

13. Do you think it desirable that the process and practice of the three courts should be placed in all respects on the same footing, and what effect would that have on the distribution and dispatch of business ?

14. Supposing that the Welsh and palatinate jurisdictions, or either of them, should be abolished — that a correspondent accession of business should accrue to the courts at Westminster, and that a new circuit should be appointed, would it not be necessary in that case, to add two judges at least to the existing number ?

15. Are you or are you not of opinion that on the same supposition, and supposing also effectual means to be taken for making the courts of common pleas and exchequer discharge a due proportion of the general business of the country, it would be expedient, for the sake of preserving an entire uniformity and equality among the courts, to appoint in addition to the present number of judges another judge to each of the courts, taking into account the advantage that might be derived from a fifteenth judge while his brethren were engaged on the circuits ?

16. Would not the necessity for a fifteenth judge be clear, if a change of practice were introduced, by which process should be returnable and pleadings should follow thereon in term and vacation without distinction, and would not the constant attendance of a judge in town be in such case required ?

17. Supposing this augmentation in the number of the judges, do you think it desirable that one puisne judge of each court should be exempted in rotation from attendance in banc during the whole term, for the purpose of attending to chamber business, and any other business of a kind that requires the attendance only of a single judge ?

18. On the same supposition do you think it desirable that the sittings of the court in banc, should be continued from day to day throughout the term, without interruption from sittings at nisi prius, or hearing arguments in courts of error or elsewhere, with the exception of the house of lords ?

19. On the same supposition would it be desirable that one puisne judge should be appointed to sit during term, for the trial of all issues arising in any of the courts which are set down for trial in London and Middlesex ?

20. Do you see any objection to authorising every judge, to whatever court he may belong, to transact chamber business, and sit for trial of issues arising in any of the common law courts of Westminster Hall ?

21. Do you think it desirable to transfer to the court of exchequer, cases reserved

by the courts of general and quarter sessions, and to confine informations for offences against the revenue and revenue officers, and *qui tam* actions to that court ?

22. Do you think it desirable to allow the judgment to be given at the sittings or assizes in cases of misdemeanor, and what exceptions (if any), and what provisions would you suggest on that subject ?

23. Do you think it desirable to transfer all jurisdiction over insolvent debtors to the insolvent debtors' court ?

24. Do you think it desirable that the terms should be fixed, and to what periods ? or that they should be of equal and what length, and should any and what regulations be made with respect to the periods and durations of the sittings after term, regard being had to the spring and summer assizes ?

25. Do you think it would be expedient that the court of error from each of the courts should consist of the judges of the other two courts, who should sit in error out of term ?

26. Have you any suggestion to make for the more satisfactory dispatch of business, besides what may be contained in your answers to the preceding questions ?

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### EXPECTED CHANGES OF POLICE.

Mr. MARCH PHILLIPPS has for some time been officially engaged in framing the bill or bills to be submitted to Parliament for effecting the improvements, as they are called, recommended by the Police Committee which sat during the last session.

The first alteration recommended by the committee, and the most important to the profession is, that written informations should be abolished in all those cases where the magistrates have a summary jurisdiction. This recommendation is made by the committee at the instance of Mr. Dyer, one of the magistrates at Marlborough-street Police-office. He stated to the committee (Report, p. 17.) " That the technical accuracy required in an information before a justice is such, that the most extensive practice and longest experience in the profession are not sufficient, in drawing up, to ensure ultimate success, and certainly not to escape objections being taken to the manner of setting out the offence, in this mode of proceeding ; there is, besides, additional delay created by it. In order to avoid these difficulties, and to render the punishment of offences more easy and summary, the proceeding by summons should supersede the necessity of commencing proceedings by a written information, which amounts to an absolute denial of justice to the poorer or the busy classes, and summary jurisdiction becomes, in fact, dilatory and frequently nugatory."

The motive assigned by the witness is, of course, sympathy for the poor, and we are bound to receive and laud it. We conceive, however, that two clauses of the last sentence have been accidentally omitted in the Report, and that after the words " easy and summary," it should read thus ;—" And, moreover, to save the unpaid magistrates the intolerable bore of reading or of acquiring any knowledge of the laws, and also to save the paid magistrates the trouble of keeping up or of applying the little they have acquired," &c.

In the metropolis, where the magistrates are somewhat under the control of public opinion, the measure may be beneficial ; but we question whether the poor in the country will derive much advantage in having their unlearned magistrates freed from the necessity of acting upon written informations. Mr. Dyer's arguments for the abolition of written informations may be found in p. 173 of the evidence printed with the Report. He there recommends that the right of appeal should be taken away in all cases where a magistrate may not convict in a higher penalty than five pounds. The majority of members of parliament are magistrates, and the possibility of any abuse of power placed in their own hands could never occur to them, neither could it be conceived by them that five pounds might be a serious sum for any man to lose, or that the principle involved in conviction of such a penalty might be of far greater importance than the amount ; nor could they at once see that it could be of any vast importance with relation to the feelings of the parties, or that a poor man might be persecuted and ruined by repeated misdecisions, unless he had the right of appeal. The adoption of this recommendation (as far as we are at present informed) is not likely to be ventured upon during the ensuing session.

The next recommendation made at the instance of Mr. Dyer is, " that is a case where the charge is for felony, the warrant issued against the person should run into all counties and over all jurisdictions, without being backed by the local magistrates ;" and he suggested also, " that in the case of a search warrant, the local magistrate should have the power to back and authorize the execution of the original warrant." " But," says the Report, p. 17, " Your committee do not see any reason for making a distinction between the cases ; and recommend that, in future, warrants, whether to apprehend the person or search the premises, shall be executed in all parts of the kingdom under the authority of the magistrates from whom it originally issues, who alone can and ought to be responsible for the legality of the proceedings."

The law of venue, as applicable to cases of forgery, will most probably be altered, in conformity to the suggestions of Mr. Gates, the solicitor to the committee of London bankers. He represented to the committee that, as the law at present stands, although it can be shown that the whole body of a bill of exchange or cheque is in the handwriting of a particular individual, yet there is no chance of convicting him of the forgery, unless it can also be proved that he wrote it in some specified place, which, in nineteen cases out of twenty, it is impossible to do, and which, if done, would, in all probability be perfectly immaterial to the justice of the case. Thus the person who committed the forgery escapes unless he is detected as the utterer, when the fact of the instrument being in his handwriting is adduced as evidence that he uttered the forgery with a guilty knowledge. But the adroit criminal gets a boy, a porter, or some innocent person, to utter the check, and takes precautions to avoid being apprehended or identified in the event of the forgery not succeeding. Very extensive forgeries are thus often committed by a forger without detection. Mr. Gates left the specific remedy to be determined by the legislature.

At the same time that such additions are made to the power of the magistrates, we would humbly suggest that something in the shape of additional securities against its abuse should be given to the public. The first measure of this nature which occurs to us is that the law, as laid down in *Rex v. Barrow*, 3 Barn. & Ald. 432. and in *Cox v. Coleridge*, 1 Barn. & C. 37. as to the right of a person accused of felony to

have professional aid when examined before a magistrate, should be altered. It will be recollected that the right of a person accused to have the aid of counsel or attorney during an examination of a charge preferred before a magistrate, was denied on the ground that such professional assistants might give information and enable the accomplices of a guilty prisoner to escape from the hands of justice. This, of course, cannot apply to public examinations, which, in the metropolis at least, are at the rate of above one hundred to one of the private examinations. The practitioners in the criminal courts are sufficiently aware that in not one case out of every hundred of these privately examined, are the chances of detecting or apprehending accomplices who may be at large increased by secrecy, since they almost always provide for the worst. When a prisoner is committed for trial, unless he is put in solitary confinement until the time of trial arrives, secrecy is at an end. It is requisite, then, to enable him to make the complete defence "which the humane policy of our law allows," that he should have professional assistance to investigate the evidence adduced against him, to submit the grounds (if any) of its insufficiency for a committal, or to prepare any defence of which the charge may be susceptible. We are prepared to contend, therefore, that the accused should be entitled to call in the aid of either counsel or attorney at all public examinations and at all final examinations. No professional man can be expected to perform his duty with perfect independence if he be permitted to attend only as a matter of favour, to be granted at the discretion of the magistrates. Even in the metropolis, there have been some instances of gross abuse of the power of exclusion conferred by these decisions on the magistrates. One case came within our own knowledge:—A magistrate had exerted himself with unusual zeal to get up a case for a prosecution; an attorney, who attended on behalf of the accused, ventured, in a mild tone, to make an objection to the admission of a piece of evidence. The magistrate, fired at his work being meddled with, exclaimed, in an insolent tone, "I will not hear you; and, if you interfere again, I will turn you out, as you know that, by the decision in the case of *Cox v. Coleridge*, I am entitled to do."

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#### BENEFIT SOCIETIES.

DURING the last session of parliament a bill was brought into parliament by Mr. Courtney, to amend and consolidate the various acts for the regulation of friendly societies. That bill excited great alarm amongst the members of such societies, and those of the metropolis appointed a committee to oppose it. The alarm was created by the circumstance that the bill went to deprive the members of the power of conducting their own affairs, and to place them in the hands of trustees, who, from the pecuniary qualifications required, must have been of a higher rank in society. The committee of the house of commons, on hearing evidence from the parties, recommended them to frame such a bill themselves as would effect, in a manner satisfactory to all parties, the beneficial objects in view. The members, with great alacrity, availed themselves of the very liberal recommendation; and as the measure will affect societies which are ascertained to comprehend upwards of one million of members in England, it is deserving of very considerable attention.

The deputies from the various societies have agreed upon the draught of their proposed bill. It repeals all former acts. It lays down regulations for the enrolment of the rules by the magistrates, and it gives the members powers to obtain the settlement of disputes by magistrates or by arbitrators; the decisions obtained by either mode to be final. It is proposed as a new measure, to prevent frauds upon the societies, that any two magistrates shall have power to decide upon any accusation of fraud against a member, and upon conviction, to fine him double the amount of the sum of which he may have defrauded the society; and in the event of non-payment, to levy upon his goods for the amount; and finally, in the event of the warrant not being satisfied, to commit him to prison for a period not exceeding three months.

The regulation of the bill of 1819, requiring the certificate of two actuaries as to the soundness of the construction of the tables of insurance, the rates, and rules for the management of these societies, has been omitted, on the ground that sufficiently correct information is not possessed of the casualties of sickness and mortality occurring amongst the working classes, from which to deduce safe tables. Mr. Brougham, and the Society for the Diffusion of Useful Knowledge, took up this subject, and set to work to obtain the information most required. Enough is known of the averages of mortality occurring amongst the higher and middling ranks of society, from which to deduce correct tables of the chances of life amongst them. Little or nothing satisfactory is known of the rate of mortality amongst the working classes, from which to construct safe tables of the chances of life amongst them, and almost as few data are possessed for determining the probable amount and nature of the sickness to be provided for by them. There is, however, satisfactory evidence for believing, that the chances of sickness and mortality in one class are double those prevailing in another. Now, a table formed from the mean of the casualties of two classes which differed so considerably, would obviously be inapplicable to determine correctly the chances occurring in either. Yet most of the tables are made up from the mean of the casualties found to prevail amongst large classes. The desideratum was, therefore, to obtain information of the amount of sickness and mortality prevalent amongst particular classes or particular trades, that tables might be formed for the safe government of societies composed of those classes or trades. Such information was not only of immediate and great practical importance, but it was highly desirable in a scientific and philosophical point of view. Yet this was the information which the Society for the Promotion of Useful Knowledge, with Mr. Gompertz, the actuary and mathematician amongst them, neglected to provide for in the schedules which they sent about, though their attention had been called to the subject. The very operatives have seen the egregious omission, and we are glad to perceive, from the draught of the bill, that they have remedied it. They have inserted one rule for the collection of the desirable information, which rule provides, that at the end of every five years, returns shall be made according to the annexed schedules. These schedules set forth the nature of the casualties of sickness and mortality occurring amongst the members during that period, and the nature of their several trades. This regulation is deserving of the warmest applause, as it proves they have got rid of the absurd jealousy which once prevailed amongst them of giving such information, lest it should be used by other societies to establish themselves on a firmer basis by the improvement of their tables.

On the important subject of the investment of the funds, the proposed bill very

properly forbids that any shall be laid on personal securities, and permits only investments in savings banks, government receipts from the commissioners for the reduction of the national debt, and real securities. With respect to this latter class of securities, the committee remark, " They would have opposed the power to invest on real securities, that is, the purchase of, or lending, money, lands, or houses, but that, in some places, in Scotland more especially, such investments are very general, and that considerable prejudice exists in their favour, to which they reluctantly yield ; but they strongly recommend that no such investments should be made ; and they are supported in this opinion by Dr. Mitchell, the talented writer and lecturer on benefit societies, to whose valuable aid your committee are deeply and gratefully indebted, and whose recommendations merit the most respectful attention. That gentleman has favoured them with the following observations on the subject :

" Permission is given to invest in real securities, that is, houses or lands. From painful experience I strongly recommend you to have nothing to do with such securities.

" First, because such securities offered for small sums are generally very objectionable, and, if accepted, occasion great expence.

" Secondly, the titles are frequently bad, and if any thing occur that law is required (and that is often the case), there is endless expence, which small properties will not bear.

" Thirdly, there is boundless fraud in the valuations set on those properties by surveyors and others.

" Take all in all, I estimate that upwards of one half of the money advanced by societies on real securities will be lost."

The advice of this experienced actuary is perfectly sound ; and it is deserving the attention of young professional men, who are oft too ready to permit the investment of small amounts in such securities. We seize this opportunity to say, that they cannot be too much on their guard against the testimony of surveyors as to the value of property. The unscrupulousness of some of the inferior and more needy members of the legal profession has given rise to vulgar jokes about the stretch of a lawyer's conscience, but the capacity of extension possessed by the consciences of a large proportion of those who call themselves architects and surveyors, is beyond any lawyer's powers of imagination. In all the compensation cases under the various acts for effecting improvements in the buildings of the metropolis, the surveyors, on whose testimony these cases depend, *swear* to double, and in many cases to treble, the value found by juries, who, from their sympathies with the traders who seek compensation, are always favourably disposed towards them. In the compensation cases which occurred on the formation of the several docks under the commission for the improvement of the port of London, the intrepidity with which the surveyors, as well as the accountants, and other men of figures, swore, was truly awful. Some conception of it may be formed, when we state, that the total amounts of the awards of extremely indulgent and liberal juries was £677,382. 8s. ; and that the total amount of the claims upon which the awards to the above amount were made, was £3,705,409. 6s. 0½d., or £3,028,036. 18s. 0½d. beyond the truth !

We have only to say further upon the draught of the bill before us, that it does credit to the sagacity of the delegates who drew it up, or of those by whom they have been advised.

## EVENTS OF THE QUARTER, &amp;c.

UNLESS our subscribers will have the goodness to consider the above, &c. as full of meaning as the &c. of Littleton, we know not how to fill a page with this division of our work. Events, alas! we have next to none; and even with the very widest interpretation of our title, taking it to include not merely events and incidents, but opinions, thoughts, feelings, hopes, wishes, hints, suggestions, recommendations, and advices, — even then we shall experience no inconsiderable difficulty in throwing in enough of these to form a respectable conclusion. In our former Numbers, the Commissioners were as rich a treasure to us as Thurtell, Fauntleroy, and Stephenson have been to the newspapers; but even the Commissioners are beginning to fail, and we know not what more we can make of them unless we set spies on their unguarded moments (we beg pardon for assuming that there are such), and try to make a collection of Table-Talk. To this, however, we must stand excused from stooping; no legal gossip will be noted here, without the informant's authority; and we refrain from enumerating any of the minute alterations which are said to be in contemplation because they are neither directly authenticated, nor of sufficient interest to justify a breach of confidence even on the narrow principles of utilitarian morality. In fact, the real-property and pleading changes are not yet decided on, though it is understood that the real-property Commissioners intend making their report by instalments, with the view, it is supposed, of obviating the suspicions which the public might entertain, were nothing exhibited till the whole was completed; and the report on the practice and constitution of the courts, as also on the judicature of Wales, is already drawn up, and will be presented so early in the session that it would be labour lost to guess at it. It is understood that this report, so far as regards judicial arrangements, has been prepared by Mr. Serjeant Bosanquet, and so far as regards practice, by Mr. Serjeant Stephen. We incline to think that a good deal will be done, for two reasons; first, because the judges are understood to be dissatisfied with the intended alterations; and secondly, because the good people of Lancaster are considerably frightened, and want, it seems, an inquiry to themselves. We have good grounds for believing that a separate commission has been applied for; and, a few days since, the application seemed likely to succeed. The only well-authenticated *on dits* which we feel at liberty to publish are to the effect that the Welch judicature is to be superseded, and Wales taken into the English circuits, a new judge being added to each of the courts of King's Bench and Common Pleas, to meet the additional labour. The present circuits will also be modified, though we are not able to specify particulars; it seems likely, however, that Lancashire will be taken from the northern.

Terms, too, it is said, are to consist of twenty-one days each, four judges sitting regularly from ten to four, and a fifth at chambers ; no sittings for London and Middlesex during term, twenty-eight days during each vacation being allowed for them. The time at which the terms will commence is not yet definitively fixed. Another well-authenticated dictum is, that counsel not of the coif are to be admitted to speak on motions for new trials in the Common Pleas, but that in other respects the monopoly will most probably not be meddled with.

The only professional changes we have to mention have been caused by the death of Mr. Sykes, solicitor to the stamp-office, and the retirement of Mr. Justice Holroyd. In the little we have to say of the first (and indeed we might say the same of both), we find no temptation whatever to depart from that very hacknied and very silly axiom, *De mortuis nil nisi bonum* ; for we never heard any thing else. In discharging his official duties, which are by no means so unimportant as is commonly supposed, Mr. Sykes was always anxious to discriminate between fraudulent and unintentional evasion ; and was never known to sanction a prosecution when the penalty had been unconsciously incurred. He owed his situation to the late Lord Gifford's friendship. The story goes that Lord Gifford, on the vacancy occurring, called on Mr. Sykes, then pleading below the bar, and asked him to look out for some one to fill the place ; which Mr. Sykes promised to do. On inquiry, he found no one more fit for it than himself ; or, more correctly speaking, he thought the place would fit him. Accordingly, he expressed his readiness to fill it ; and the proposal was immediately assented to. Another anecdote has also reached us, which we see no harm in relating. A short time before Lord Gifford was called to the bar, he chanced to be leaving Mr. Sykes' chambers just as a now eminent king's counsel came in. "That young man," said Mr. Sykes, in allusion to Gifford, "will some time or other be at the very head of his profession. Of his standing, he is the best real property lawyer I ever knew." It is curious to compare this with Mr. Brougham's parliamentary assertion, that Lord Gifford has risen, as a man rises in a balloon, by an upward tendency not communicated by himself. At the same time we lay little stress on this species of fortune-telling, either in illustration of Mr. Sykes' sagacity, or in disproof of Mr. Brougham's sarcasm, which he has long ago been heartily ashamed of, and, much to his honour, endeavoured to obliterate by expressing sentiments of a widely different description. Mr. Bentham, on his own showing, foretold of Canning, when an under-graduate, that he would be prime minister of England ; and Mr. Bentham chanced to be right. Dr. Cyril Jackson, the late Dean of Christchurch, foretold that Lords Morley and Carlisle would be the stars of their day, and that nature had unfitted Lord Liverpool for rising. The former part of the augury we cannot venture to decide on, but undoubtedly the Doctor was wrong in the last.

In private life Mr. Sykes was universally respected, and it is worth recording, that he was the friend and intimate companion of Porson. We are informed that, when Porson was in town, a plate was always placed for him at Mr. Sykes' breakfast table ; and this is by no means an immaterial circumstance, as the Greek professor was never very nice in his choice of companions for an evening's debauch.

Mr. Sykes never practised as a barrister, though he attained to great eminence as special pleader. He was only called to the bar on accepting the office he held at the time of his death. We are not quite certain whether the being a barrister was



then a necessary qualification ; but at the time immediately preceding the Duke of Wellington's administration, some such rule prevailed, and we are sorry to see that his Grace has thought proper to lessen the rank and emoluments of the place. It is not, we repeat, a sinecure, or a mere affair of routine : large discretionary powers are vested in the solicitor, and a vexatious mode of taxation is more or less galling in exact proportion as these powers are liberally or illiberally exercised. It would be nonsense to say that the necessary qualifications are confined to barristers ; but a man of enlightened views and some legal knowledge is certainly required. Though these, for aught we know, may exist in the present solicitor (Mr. Tims), the circumstances attending his appointment are not precisely what the public should approve. Imperatively demanded as retrenchment may be, it does not look well to see ministers haggling about price, and thinking less of the value of services than how they can be had cheapest. Mr. Tims, it seems, has accepted the place at £1000 per annum, just half the salary received by his predecessor.

Mr. J. Holroyd's character has been given already by one who knew him best. Lord Tenterden lately spoke of him from the bench, as "our learned, amiable, and excellent brother." This is, indeed, "*laudari à laudato viro*," and we will not weaken the effect of such a testimony by vainly endeavouring to strengthen it. Notwithstanding the extent of his learning, Mr. Holroyd's progress at the bar was slow, and, at the age of 48, he was commended by Lord Kenyon as a "rising young man." In the Hilary vacation, 1816, (we are thus particular for the sake of posterity) George Sowley Holroyd, Esq. was called Serjeant, and gave for his motto "*Componere legibus orbem*," and was appointed to succeed the late Mr. Justice Dampier as one of his Majesty's Justices of the Court of King's Bench, and was afterwards knighted. He resigned, as every body knows, last Michaelmas vacation, and was succeeded by Mr. J. Parke.

It is not our plan to criticise cotemporary practitioners so long as they remain at the bar ; it is an invidious task which we are anxious to shun. There are cases, however, which it may be necessary to make exceptions ; and the following incident is well deserving of notice. The report is given verbatim.

*"Vice-Chancellor's Court, Monday, Jan. 26, 1829.*

*"King v. Turner.*

"This case, the circumstances of which did not transpire, was put into his Honour's paper to be spoken to. The point was of a legal nature of no public interest, but an oversight of Mr. Sugden's appeared to give considerable amusement to the court.

"Mr. Horne and Mr. Pemberton were heard on one side, and

"Mr. Sugden following, concurred in the argument of those learned gentlemen, and confidently stated that the law was quite clear.

"The Vice-Chancellor.—Then Mr. S. is with you, Mr. Horne.

"Mr. Horne said that the argument of his learned friend was, certainly to his surprise, on his side ; but that his learned friend happened to be on the other.—(Great laughter.)

"Mr. Sugden, who after consulting with his junior (Mr. Jacob) appeared not a little disconcerted, said that he found he had mistaken his side. What he had said, however, was said in all sincerity ; and he never would for any client, be he who he might, come into court and argue against what he thought to be a settled rule of

law. As learned persons, however, had differed on the present point, he hoped his Honour would decide it without reference to what had fallen from him.

"The Vice-Chancellor *promised he would do so.*"—*Times*, Jan. 27, 1829.

Now with Mr. Sugden's mishap we have nothing to do: it might have happened to any man so overwhelmed with business as himself; but we must decidedly protest against the principle which he here prescribes for the guidance of the bar. When Curran made a blunder of the same description (and the like is told of Erskine), far from losing his presence of mind or stammering out a confession of error, he calmly and instantly went on with "And now, my Lord, having anticipated my adversary's argument, I shall proceed to point out its fallacy." Mr. Sugden was not sharp enough for this, or would not condescend to it:—"He never would for any client, be he who he might, come into court and argue against what he thought to be a settled rule of law"—in plain English, "I, and not the judge, shall decide on the merits of each case submitted to me." We are really surprised that Mr. Sugden should give a moment's countenance to so intensely silly and vulgar a notion as that counsel are pledged to their own particular opinions; that he should render it necessary, at the present time, to repeat, that the only object of forensic disputation is to inform the jury or judge of all the bearings of the case, to sift the affair to the bottom, or place the point in all possible lights. Mr. S.'s principles would put a stop to advocacy, or render it utterly contemptible: and for that reason, and that only, have we taken down and drawn attention to his words.

There is one more topic which we cannot pass by—the law lectures at the London University. It was with pleasure we saw them begun; and the profession at large may be congratulated on Mr. Amos' success. We do not say this because we agree with the professor in what he said in his preliminary discourse of the advantages to accrue from attending his course. It is not true that lecture-teaching is as well adapted to jurisprudence as to other sciences. Had he limited the comparison to history, political economy, and literature, we should see no reason to dispute it, but, to the best of our recollection, it was generally, and therefore incorrectly, applied. He made no exception for those branches of knowledge (astronomy and chemistry for example), the acquirement of which is made easier by experiment; and an important distinction was implied in the joke of a friend, who gravely advised Mr. Amos to illustrate the action of ejection by introducing John Doe and Richard Roe on the boards of his theatre, and making one kick out the other. The points he ought to have pressed, and which seem to us decisive in his favour, are the glaring imperfections of the mode of instruction pursued with pleaders and conveyancers, and the want of a sufficient stimulus to induce the student to work by himself. No man should place himself in chambers, till he has taken a comprehensive view of the system at large and mastered its leading principles. "In the present state of the law, reliance upon mere point practice, which is the reliance of a great many who have exceedingly little legal learning, will certainly not avail any barrister; for, though those extensive legal reforms which would change the principles of English law are not to be expected, or perhaps wished, such changes will undoubtedly take place, and speedily, in the mere 'use' of the law, as will set all such pretensions at naught."<sup>1</sup> Few are able to study effectively without help or excitement, without

<sup>1</sup> The Athenæum, for November, 1828.

means of comparing their progress or any immediate impulse to persevering exertion. An hour's hard reading at home may be as beneficial as an hour's listening in a lecture-room ; but many a student will regularly hurry off to the latter, who would forget or procrastinate the first. It is, we believe, a consciousness of this, a lurking distrust of themselves, that induces so many of the higher order of students to inscribe their names on Mr. Amos' subscription-list. We could name more than one First-class man or Wrangler, who thinks it wiser to learn than to sneer ; and, better late than never, is collecting at a Gower-street Academy the practical knowledge Alma Mater denied him. We have conversed with many on the discourses delivered, and feel bound to state that they are generally liked.

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#### NOTICES TO CORRESPONDENTS.

WE have to acknowledge the receipt of a letter, signed J. H. on the Court of Chancery, which, could we afford room, we should be glad to print. His principal topic is the present unrestricted power of appeal from the Vice-Chancellor. "After His Honour has pronounced an order, the unsuccessful party is at liberty immediately to apply by appeal, on motion to the Lord Chancellor, to discharge it without even making a deposit or obtaining the sanction of counsel. By this mode the delinquent not only profits by delay, in retaining a large sum of money or the possession of property, but he harasses his opponent with vexation and expence." He then states that so long ago as 1710, in cases of appeal from the judgment of a master, not only was a deposit required, but the signature of counsel also ; and he proposes as a remedy for the evil stated, that the appellant, in every case of appeal on motion, should be required to deposit £10. with the registrar.

We have also received two inculpatory letters : one, which we take first, from an Irish gentleman, who, it seems, is very indignant at our remarks on Irish lawyers in No. 2. Art. 1. and considerably suggests the prudence of following Lord Coleraine's plan and soaping our nose before we exhibit it in the Hall of the Four Courts. We prefer apologising, or rather explaining. We really did not mean to speak slightly of Ireland : we were endeavouring to shew the advantages of a division of labour in law, and named Ireland by way of illustrating the inconveniences of an opposite practice. The inferiority we spoke of is not matter of blame, much less a reflection on national character ; for till the law business of Ireland is sufficiently increased to admit of distinct classes of practitioners, England must be a better school of jurisprudence.

The other angry epistle accuses us of disaffection to the magistracy, because we told a story about the Gloucester sessions, and talked of the "great unpaid." We plead guilty to the expression, and own it to be cant ; but we do not plead guilty to the charge of disaffection ; nor require to be told that the days of Squire Western are past, and that country gentlemen bred up at Eton and Westminster, Christchurch and Trinity, spending years in foreign travel, and living some months of every year in London, are no longer what Cockneys suppose them.

We are obliged to postpone our Review of Reporting.

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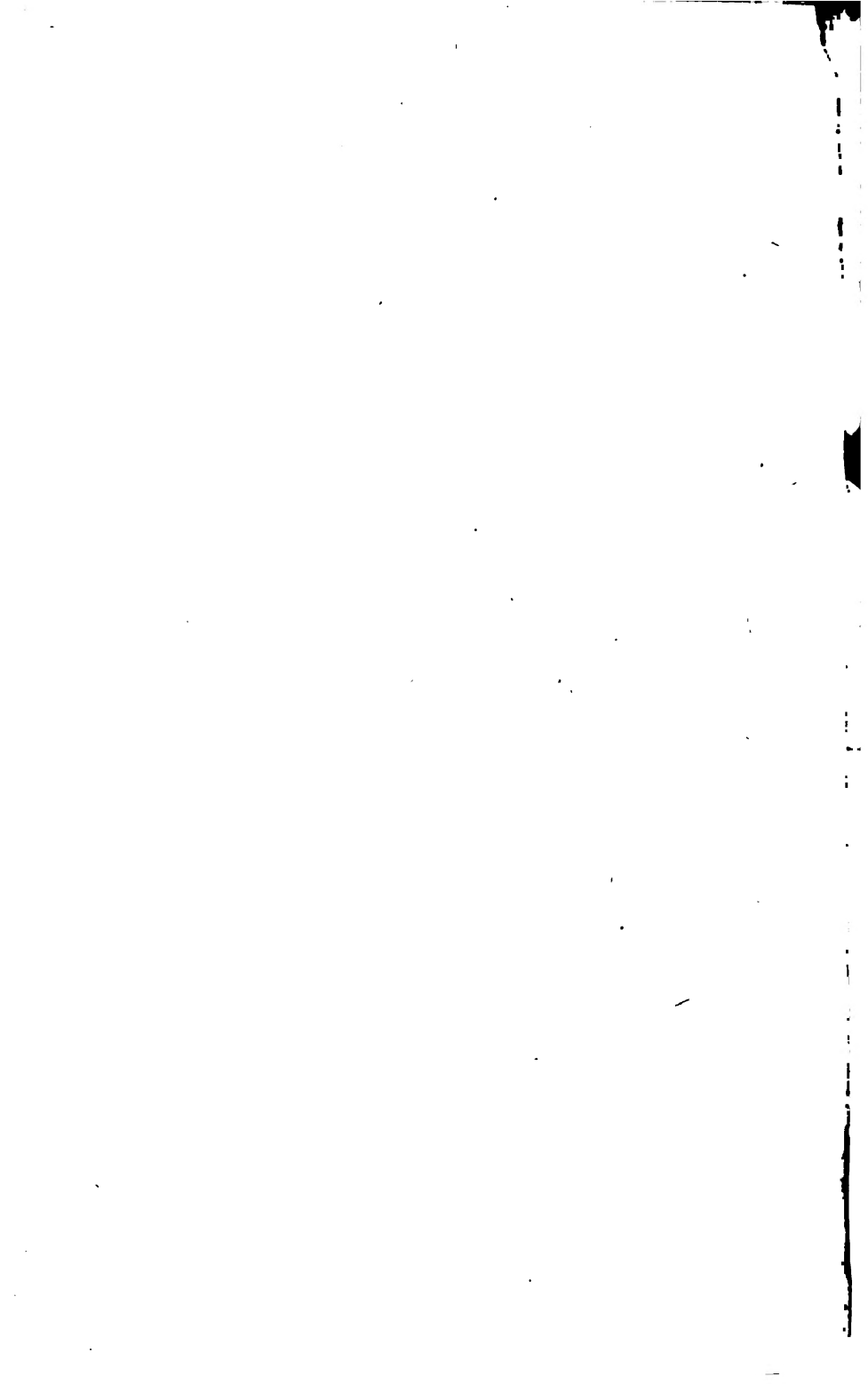
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